Supreme Court, U.S.
FILED

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1996

LEE JETER BROCK, Guardian Ad Litem for ELIZABETH H.HARDY, a minor, and LEE JETER BROCK, Individually,

Petitioners,

v.

FORREST RAY LEWIS, JAN LEWIS and LUCY LEWIS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the District Court for the Eastern District of North Carolina and the Fourth Circuit Court of Appeals impermissibly substituted facts not in evidence in deciding to dismiss this action for lack of subject matter jurisdiction?

II. Whether the Court of Appeals for the Fourth Circuit erred in holding that Petitioner's attempt to board a vessel being operated in a navigable waterway was not a traditional maritime activity?

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STATEMENT OF THE CASE

This case is a claim for relief brought by the Plaintiffs against the Defendants on March 27, 1995 submitted in the District Court. (App. 3,5,11). The Plaintiffs brought their complaint against the Defendants alleging the Defendants were negligent and were responsible for the Plaintiff's injuries. (App. 13,15). Plaintiffs asserted that the District Court's jurisdiction was based on federal admiralty jurisdiction under Rule 9(h) of the Federal Rules of Civil Procedure. (App. 12). The Defendants did not answer the complaint and moved to dismiss the complaint for lack of subject matter jurisdiction on or about May 4, 1995. (App. 6,19). The Plaintiffs filed a Substitute/Amended Complaint on May 23, 1995 to add Lucy Lewis as a named party defendant. (App. 6,22). The District Court permitted the Plaintiff's Amended Complaint on June 5, 1995. (App. 7). On June 8, 1995, the Defendants moved to dismiss the complaint for lack of subject matter jurisdiction. (App. 8,33). The District Court ordered the complaint dismissed and issued its judgment on June 19, 1995. (App. 8,36). The Plaintiffs appealed the judgment on June 23, 1995. The United States Court of Appeals for the Fourth Circuit heard oral arguments on March 7, 1996. The Fourth Circuit handed down its per curiam decision affirming the District Court's dismissal of the action on May 24, 1996. (App. 51) The Plaintiffs filed a petition for rehearing on June 7, 1996 (App. 57), which the Court denied on June 18, 1996. (App. 69). The Plaintiffs now appeal the judgment of the appellate court. The Supreme Court has jurisdiction pursuant to Article III, § 2 of the United States Constitution.

STATEMENT OF FACTS

The Plaintiff, Elizabeth H. Hardy, was an invited guest at the floating dock of the defendants on August 19, 1994. (App. 12,23). The defendants' home is located on the Intracoastal Waterway. (App. 11,23). The defendants are the owners of the house, "its surrounding land and a pier with an attached floating dock which led into and serviced the Intracoastal Waterway." (App. 12,23). The Plaintiff, Elizabeth H. Hardy, came to the defendants' floating dock by navigating a WaveRunner on the Intracoastal Waterway to the defendants' floating dock. (App. 12,24). Said WaveRunner is duly registered under the boat registration laws of North Carolina pursuant to North Carolina General Statute 75A-5. The boat registration number is NC-8475 CG. The plaintiff then docked the WaveRunner and secured same to the floating dock. The defendant, Lucy Lewis, soon after boarded the WaveRunner and navigated it into the Intracoastal Waterway. After a short while the defendant, Lucy Lewis, commanded the plaintiff to dive into the Intracoastal Waterway and board the WaveRunner. (App. 13, 24). The plaintiff, pursuant to the command of the defendant, then dove into the Intracoastal Waterway from the floating dock. (App. 13,24). At the time, the depth of the waterway surrounding the floating dock was only twelve inches deep. (App. 12,23). The plaintiff was rendered quadriplegic as a result of the injury she sustained from the dive. (App. 13,24).

ARGUMENT

This case is subject to *de novo* review.

I. THIS ACTION SHOULD NOT BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE THE FACTS AS ALLEGED ARE SUFFICIENT TO SUPPORT A CLAIM SOUNDING IN ADMIRALTY

> "There are two critically different ways in which to present a motion to dismiss for lack of subject matter jurisdiction. First, it may be contended that a complaint simply fails to allege facts upon which subject matter jurisdiction can be based. In that event, all the facts alleged in the complaint are assumed to be true..."

Adams v. Bain, 697 F.2d 1213 (4th Cir. 1982).

The petitioners in this case have alleged in their complaint that Elizabeth Hardy dove into the Intracoastal Waterway at the command of the respondent, Lucy Lewis, to board the vessel piloted by Lewis on the Intracoastal Waterway. (App. 13,24). Accepting this set of facts as true, there is sufficient evidence to support a claim sounding in admiralty. However, in the order of the District Court for the Eastern District of North Carolina, the Honorable James C. Fox presiding, the court found that Elizabeth Hardy was not engaged in an act of boarding but rather in "child's play" (App. 46). On appeal to the Fourth Circuit Court of Appeals, the appellate court found that the petitioner Elizabeth Hardy was engaged in "recreational swimming and diving" (App. 55), in direct contradiction of the facts alleged by the petitioners in their complaint.

By arriving at a decision based on its own set of facts, the district court erred in dismissing the action based on a 12(b)(1) motion. The Fourth Circuit perpetuated this error by affirming the district court's version of the facts on appeal. By doing so, both lower courts put themselves in the improper position of finder of fact. The only facts which should have been considered were the ones alleged in the complaint, which clearly stated that Elizabeth's fateful dive was made in response to Lewis' command to board the WaveRunner.

The set of facts which should have been the basis for the decision whether to dismiss for lack of subject matter jurisdiction clearly show that Elizabeth dove off that pier for one purpose only - to board the vessel as she was commanded to do by Lucy Lewis. Before that fateful dive, she had not been engaged in recreational swimming and diving. Instead, she had been sunbathing while Lucy Lewis piloted the WaveRunner in the Intracoastal Waterway. Elizabeth did not dive into the waterway in response to a command by the respondent to dive in and do some recreational swimming. Rather, the command was to board the WaveRunner. The only way to do so was to get off the pier and swim to the vessel, which was out in the waterway due to the negligent navigation of the vessel by Lewis. Finally, Elizabeth, did not spontaneously decide to do some recreational swimming and diving. The facts which the petitioners have alleged indicate that had it not been for the command of the respondent, Elizabeth would not have attempted to enter the water for recreational purposes. However, when she heard the respondent's command to board the vessel, she attempted to comply in the only way possible - by entering the water and swimming out to the vessel. Although Elizabeth never completed that swim due to her injury, it is clear that the purpose of the swim was not recreational, but was instead an attempt to board the vessel being piloted by the respondent, Lucy Lewis.

The foregoing set of facts is the only set which should have been considered by the lower courts. By improperly basing its decision on the district court's finding of facts, the Court of Appeals clearly overlooked the law with regard to dismissals of claims for want of subject matter jurisdiction. The Supreme Court has held that a motion to dismiss an action for want of subject matter jurisdiction may be granted only if it appears beyond doubt that the plaintiff can prove no set of facts in support of her claim which would entitle her to relief. Conley v. Gibson, 355 U.S. 41, 2 L.Ed.2d 80 (1957). In the case at bar, the plaintiffs have offered sufficient facts to support their contention that Elizabeth dove into the water in order to board the WaveRunner. (App. 13, 24). In fact, the 12(b)(1) motion made by the respondents/defendants was a pre-answer motion; so far in this case, no answer has been made, and the only facts in the case are those alleged by the petitioners/plaintiffs. (App. 6-19). Although the respondents will no doubt dispute these facts at some point, that dispute is for the trier of fact to decide. The relevant issue for the district court, rather, is whether it is *beyond doubt* that the plaintiff can prove no set of facts which would entitle her to relief. In this case, based solely on the complaint, it is certainly not beyond doubt that the petitioners might be able to prove that Elizabeth made her unfortunate dive in an attempt to board the vessel being piloted by the respondent Lucy Lewis. If doubt exists as to the purpose of Elizabeth's dive, then by definition the issue cannot be "beyond doubt". That doubt should be resolved by a trier of fact, not by the district court in deciding a pre-answer motion. For the District Court to hold that it is "absurd" (App. 46) to believe that Elizabeth's plan to board the WaveRunner was in no way connected to a traditional maritime activity was an improper finding of fact which resulted in an erroneous conclusion of law.

II. BY PUTTING ITSELF IN THE IMPROPER POSITION OF FINDER OF FACT, THE COURT OF APPEALS INAPPROPRIATELY HELD THAT PETITIONER'S ATTEMPT TO BOARD THE VESSEL WAS NOT A TRADITIONAL MARITIME ACTIVITY

Article III, Section 2 of the United States Constitution provides federal jurisdiction over admiralty and maritime law. U.S. Const., art. III, section 2. Though admiralty jurisdiction originally applied to any wrong located on navigable waters, the United States Supreme Court refined this standard over the last two decades. In Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 34 L.Ed.2d 454, 93 S.Ct. 493 (1972), the Court found, in the context of an airplane crashing in navigable waters, "it is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity." Id., at 467. The Court most recently confirmed its standard for admiralty jurisdiction in Jerome B. Grubart Inc. v. Great Lakes Dredge and Dock Co., ___ U.S. ___, 130 L.Ed.2d 1024, 115 S.Ct. 1043 (1995). The Court stated:

> [A] party seeking to invoke federal admiralty jurisdiction pursuant to 28 USC 1333(1) over a tort claim must satisfy conditions both of location and of connection with maritime activity. A court applying the location test must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water. The connection test raises two issues. A court, first, must 'assess the general features of the type of incident involved' to determine whether the incident has 'a potentially disruptive impact on maritime

> commerce.' Second a court must determine whether 'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.' Id. at 1035. (citations omitted).

In the case at bar, the Plaintiff sustained her injury within the navigable waters of the Intracoastal Waterway. As the district court accurately described: "courts have had little difficulty finding that injuries sustained when a plaintiff is injured upon navigable waters are sufficient to meet the 'locality' test." (App. 43) (citations omitted). The district court also correctly found "for purposes of determining the 'locality' of a tort in this context, it is not the place where the negligent act occurred that is important; IT IS THE PLACE OF INJURY THAT CONTROLS." (App. 43 (emphasis supplied). In favor of this point, the district court cites Chapman v. City of Grosse Point Farms, 305 F.2d 962 (6th Cir. 1967) where the Sixth Circuit Court of Appeals found the location prong to be satisfied for a claimant that dove off a pier into 18 inches of water and injured himself. Referring to the claimant's injury, the court said "the 'substance and consummation' of the alleged tort here did not occur upon the dock, and this case is therefore governed by the authorities which hold that A TORT IS DEEMED TO OCCUR AT THE PLACE WHERE INJURY IS SUSTAINED, REGARDLESS OF THE PLACE OF ORIGIN OF THE NEGLIGENT ACT." Id., at 965 (emphasis supplied).

The Plaintiff in the case at bar was injured in navigable waters - specifically the navigable waters of the IntraCoastal Waterway. After diving into the IntraCoastal Waterway as a result of the negligence of the Defendants, the Plaintiff hit her head on the bottom and was subsequently rendered quadriplegic. It is self-evident that

the "substance and consummation" of the Plaintiff's injury occurred in navigable waters. And, since "a tort is deemed to occur at the place where injury is sustained, regardless of the place of origin of the negligent act," the locality test is clearly satisfied in the case at bar. Chapman, at 965.

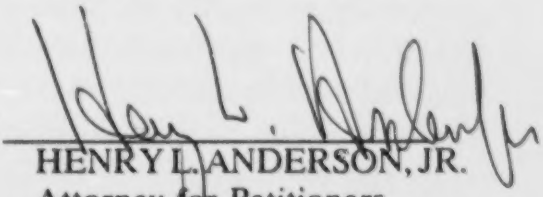
The facts of this case also show that the Plaintiff has satisfied not only the navigable waters prong of the locality test, but also the "traditional maritime activity" prong as well. By focusing on the "general character of the activity", Sisson v. Ruby, 497 U.S. 358, 111 L.Ed.2d 292, 301 (1990), several other courts have found that boarding is a traditional maritime activity. See, for example, Price v. Price, 929 F.2d 131 (4th Cir. 1991) (disembarking a vessel was related to an activity that was traditionally maritime); Butler v. American Trawler Co., Inc., 707 F.Supp. 29 (D. Me. 1989) ("When negligence causes injury during the boarding of a vessel...the resulting cause of action sounds in admiralty..."); and Tullis v. Fidelity and Casualty Co. of New York, 397 F.2d 22 (5th Cir. 1968) (failure to provide safe means for disembarking is tort which sounds in admiralty). Clearly, boarding constitutes a traditional maritime activity. Because boarding is a traditional maritime activity which in its generality could effect navigational trade and commerce on navigable waters, the second prong of the Executive Jet test is satisfied. Based on the facts found in the Plaintiff's complaint, which, as stated above, are the only facts to be considered in this case, Elizabeth Hardy was rendered quadriplegic when she dove into a navigable waterway in order to board a vessel. Therefore, because Elizabeth was injured in a navigable waterway while engaging in a traditional maritime activity, the two-prong locality test is satisfied and admiralty jurisdiction applies.

CONCLUSION

The district court and the Court of Appeals both erred in deciding the case based on facts not contained in the record. By substituting their own version of the facts, the lower courts erred in finding that the Petitioner's act of boarding the vessel in navigable waters was not a traditional maritime activity. The Supreme Court of the United States should grant the petitioner's writ of certiorari and hold that, based upon the only facts in the case, Petitioner was engaged in a traditional maritime activity in navigable waters, and that therefore admiralty jurisdiction should apply. In the alternative, the Supreme Court should grant the Petitioner's writ of certiorari and remand the case to the district court for a proper determination of jurisdiction based solely upon the facts as set forth in the original complaint.

Respectfully submitted,

ANDERSON, DANIEL & COXE

BY: 

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1996

LEE JETER BROCK, Guardian Ad Litem for ELIZABETH H.HARDY, a minor, and LEE JETER BROCK, Individually,

Petitioners,

v.

FORREST RAY LEWIS, JAN LEWIS and LUCY LEWIS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX

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APPEAL CLOSED
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U.S. DISTRICT COURT
Eastern District of North Carolina
(Wilmington)

CIVIL DOCKET FOR CASE #: 95-cv-44

Brock, et al v. Lewis, et al — Filed: 03/27/95
Assigned to: Chief Judge James C. Fox
Demand: $50,000
Lead Docket: None
Dkt# in other court: None
Jury demand: Plaintiff
Nature of Suit: 340
Jurisdiction: US Plaintiff

Cause: 28:1292 Personal Injury on Navigable Waters

LEE JETER BROCK, Individually
and Guardian Ad Litem for
Plaintiff — Henry L. Anderson, Jr.
[COR LD NTC]
Anderson, Cox, Collier & Ennis
P.O. Box 1166
Wrightsville Beach, NC 28480
919-256-5577

ELIZABETH H. HARDY, a minor
Plaintiff — Henry L. Anderson, Jr.
(See above)
[COR LD NTC]

v.

FORREST RAY LEWIS, and
Defendant — William Robert Cherry, Jr.

[COR LD NTC]
P. O. Box 2088
Wilmington, NC 28401

John L. Coble
[COR LD NTC]
Marshall, Williams & Gorham
14 S. 5th Street
919-763-9891

JAN LEWIS
Defendant

William Robert Cherry, Jr.
(See above)
[COR LD NTC]

John L. Coble
(See above)
[COR LD NTC]

APPEAL
CLOSED
DI

Proceedings include all events.
7:95cv44 Brock, et al v. Lewis, et al

LUCY LEWIS
Defendant

Proceedings include all events. APPEAL
7:95cv44 Brock, et al v. Lewis, et al CLOSED
DI

Proceedings include all events. APPEAL
7:95cv44 Brock, et al v. Lewis, et al CLOSED
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3/27/95	1	Complaint filed-assigned USMJ Dixon. JURY DEMAND.(le) [Entry date 03/31/95]
3/27/95	--	Summons(es) issued for Forrest Ray Lewis, Jan Lewis (le) [Entry date 03/31/95]
3/27/95	--	Filing Fee Paid; FILING FEE ($120.00 RECEIPT #31037 (le) [Entry date 03/31/95]
3/31/95	2	Return of service executed as to Forrest Ray Lewis, Jan Lewis on 3/28/95 by cert. mail. Answer due on 4/17/95 for Jan Lewis, for Forrest Ray Lewis (le)

4/7/95	3	Motion by Forrest Ray Lewis, Jan Lewis to extend time to answer (le) [Entry date 04/10/95]
4/7/95	4	Order granting [3-1] motion to extend time to answer, set answer due for 5/8/95 for Jan Lewis, for Forrest Ray Lewis signed by Eggleston, Dep. Clk. Cpys. to counsel for svs. (le) [Entry date 04/10/95]
5/4/95	5	Motion by Forrest Ray Lewis, Jan Lewis to dismiss (le)
5/4/95	6	Memorandum by Forrest Ray Lewis, Jan Lewis in support of [5-1] motion to dismiss (le)
5/4/95	7	Request for Discovery Plan: Discovery Plan due by 6/5/95 (le)
5/16/95	8	Document filed by defendant Forrest Ray Lewis, defendant Jan Lewis titled Notice of Correction of Citation cited in mem. in support of motion to dismiss (doc. 6) at pg. 9. (le) [Entry date 05/17/95]
5/23/95	9	Motion by Forrest Ray Lewis, Jan Lewis to stay discovery (le)
5/23/95	--	Motion(s) referred: referred [9-1] motion to stay discovery to USMJ Wallace W. Dixon w/case file. (le)
5/23/95	16	Amended complaint by Lee Jeter Brock, Elizabeth H. Hardy, adding defendant Lucy Lewis :amends [1-1]

complaint (le) [Entry dated 06/05/95]

5/24/95	10	Motion by Lee Jeter Brock, Elizabeth H. Hardy to amend [1-1] complaint (le)
5/24/95	11	Memorandum by Lee Jeter Brock, Elizabeth H. Hardy in opposition to [5-1] motion to dismiss (le)
5/30/95	12	Memorandum by Lee Jeter Brock, Elizabeth H. Hardy in support of [10-1] motion to amend [1-1] complaint; cpy. to Judge Dixon. (le) [Entry date 05/31/95]
5/30/95	13	Response by Lee Jeter Brock, Elizabeth H. Hardy to [9-1] motion to stay discovery; cpy. to Judge Dixon. (le)

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Proceedings include all events.
7:95cv44 Brock, et al v. Lewis, et al
APPEAL CLOSED
DI
[Entry date 05/31/95]

5/31/95	14	Reply by Forrest Ray Lewis, Jan Lewis to response to [9-1] motion to stay discovery; cpy. to Judge Dixon. (le) [Entry date 06/01/95]
6/5/95	15	Order granting [10-1] motion to amend [1-1] complaint directing clk. to file amended comp. as of 5/23/95. signed by Judge Dixon. OB Ref:

		FOXOB#3, pg. 32. Cc to counsel. (le)
6/5/95	17	Letter Order granting [9-1] motion to stay discovery signed by Judge Dixon. Cpys. served by Judge Dixon's office. (le)
6/5/95	18	Reply by Forrest Ray Lewis, Jan Lewis to response to [5-1] motion to dismiss (le)
6/7/95	19	Acknowledgement of service as to Lucy Lewis on 6/7/95 by service on William Robert Cherry, Jr. Answer due on 6/27/95 for Lucy Lewis (le) [Entry date 06/09/95]
6/8/95	20	Motion by Forrest Ray Lewis, Jan Lewis to dismiss (dfts. rely on memorandum doc. #6) (le) [Entry date 06/09/95]
6/19/95	21	Order granting [20-1] motion to dismiss, granting [5-1] motion to dismiss signed by Judge Fox. OB Ref: FOXOB#3, pg. 59. (cv)
6/19/95	22	Judgment for Forrest Ray Lewis, Jan Lewis, Lucy Lewis against Lee Jeter Brock, Elizabeth H. Hardy; IT IS ORDERED AND ADJUDGED the court concludes that no admiralty jurisdiction exists in this case, and therefore, the court is w/o subject matter jurisdiction. Pursuant to Rule 12(b)(1), the dfts' Motion to Dismiss is ALLOWED, and this action is DISMISSED, signed by

		Judge Fox. OB Ref: FOXOB#3, pg. 60. Cpys svd. (cv)
6/19/95	--	Case closed NP. (cv)
6/23/95	23	Notice of appeal by Lee Jeter Brock, guardian ad litem for Elizabeth H. Hardy, a minor. (Appealing order of 6/19/95) Appeal record due on 8/2/95. lc: 4th Circuit Court of Appeals, lc: Judge Fox, lc: counsel of record. (ag) [Entry date 06/28/95]
6/23/95	--	USCA appeal fees received $105.00 Receipt #: 31091 (ag) [Entry date 06/28/95]
6/25/95	--	Case file to Appeals Section. (cv)
6/27/95	--	Notice of Appellate Action to USCA and counsel re: [23-1] appeal by Lee Jeter Brock. Appeal Pkg. mailed consisting of Dkting Statement, Transm. Sheet and Index. (ag) [Entry date 06/28/95]

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Proceedings include all events. APPEAL

7:95cv44 Brock, et al v. Lewis, et al CLOSED

DI

6/28/95	--	Transmitted certificate to record on appeal to U.S. Court of Appeals: [23-1] appeal by Lee Jeter Brock. lc: Judge Fox, lc: counsel of record. (ag)

I certify the foregoing to be a true and
correct copy of the original
David W. Daniel, Clerk
United States District Court
Eastern District of North Carolina
By s/ Ann Godwin
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

CIVIL ACTION NUMBER: 7-95-CV-44-F3

FILED Mar 27 '95
David W. Daniel, Clerk
U.S. District Court
Raleigh, No. Car.

LEE JETER BROCK, Guardian Ad Litem for ELIZABETH H. HARDY, minor, and LEE JETER BROCK, Individually,	)
Plaintiff	)
v.	**COMPLAINT**
FORREST RAY LEWIS and JAN LEWIS,	)
Defendants	)

The plaintiffs, by and through counsel, complaining of the defendants, hereby say and allege as follows:

FIRST CLAIM FOR RELIEF

1. Plaintiffs are citizens and residents of the State of North Carolina, Pender County, and the minor plaintiff, ELIZABETH H. HARDY, is a minor (D.O.B. 9-27-79) represented in this action by her Guardian Ad Litem, her mother, who has care, custody and control of said minor.

2. Defendants are citizens and residents of the County of Pender, State of North Carolina, residing in a home situated on the Intercoastal Waterway which is

equipped with a pier and an attached floating dock which extends into and services the navigable waters of the Intercoastal Waterway.

3. The wrongs herein involved occurred on navigable waters and bear significant relationship to traditional maritime activity and plaintiffs hereby designate and deem this action to be an admiralty matter under Rule 9(h) of the Federal Rules of Civil Procedure.

4. At all times relevant herein, defendants, FORREST RAY LEWIS and JAN LEWIS, were the owners of the aforementioned home, its surrounding land and a pier with an attached floating dock which led into and serviced the Intercoastal Waterway.

5. Defendants have lived in the aforementioned residence and have maintained the pier and floating dock herein involved for in excess of ten (10) years and are familiar with the tidal changes common to the area.

6. The minor plaintiff had used defendant's floating dock with their knowledge and permission sporadically for approximately six weeks prior to August 19, 1994.

7. On August 19, 1994, the plaintiff, ELIZABETH H. HARDY, was an invited guest at the aforementioned home owned by the defendants and was using the aforementioned floating dock and on said date at approximately 3 o'clock p.m. and, unknown to the minor plaintiff, the tides were extremely low and the depth of the water at the end of the floating dock was approximately twelve (12) inches deep.

8. At all times relevant herein, defendants had full knowledge that the minor plaintiff had regularly used the floating dock and had dove from the floating dock on numerous occasions and had been present at the dock during said dives and had acquiesced thereto.

9. On this occasion, plaintiff ELIZABETH H. HARDY, had arrived at the defendants' floating dock via a pleasure boat traveling on the Intercoastal Waterway with various other boats.

10. At the time of the injuries herein involved, the minor plaintiff, ELIZABETH HARDY, was in the process of boarding a boat/vessel pursuant to the commands and directions of the captain of said boat that was in and on and underway in the navigable channel of the Intercoastal Waterway near Red Marker 100.

11. At the time the injuries were sustained, the minor plaintiff dove from the defendants' floating dock into the navigable channel of the Intercoastal Waterway at the command, direction and urging of captain Lucy Lewis who was then the captain and operator of the vessel that was underway in the navigable channel of the Intercoastal Waterway and which the minor plaintiff was in the process of boarding.

12. On August 19, 1994, at approximately 3:00 p.m., the plaintiff, ELIZABETH H. HARDY, fourteen (14) years old, dove off the aforementioned floating dock into the waters of the Intercoastal Waterway as aforesaid and immediately struck the sandy bottom of the waterway with her head and was rendered a quadriplegic.

13. That defendants were negligent in the following respects:

(a) Defendants knew or should have known that around the floating dock it was not unusual to experience excessively low tides several times per year created by known environmental and gravitational influences and that these extreme low tides created a hidden, latent, defect and trap at the end of the floating dock referred to herein that ordinarily was not present, and the defendants knew that one could not normally see more than one to two inches in depth in the Intercoastal Waterway due to the coffee color consistency of the water;

(b) They negligently, consciously, recklessly or otherwise tortiously owned, managed, possessed, entrusted, maintained, repaired, had designed, inspected or equipped the aforementioned floating dock on defendants' property;

(c) They negligently, consciously, recklessly or otherwise tortiously owned, managed, possessed and

trusted, maintained, repaired, had designed, inspected or equipped a boarding facility used, among other things, for the boarding of vessels on the navigable channel of the Intercoastal Waterway;

(d) They failed to adequately instruct, advise, warn or supervise minor users, and specifically the minor plaintiff, ELIZABETH H. HARDY, or occupants of said floating dock, specifically, the minor plaintiff, ELIZABETH HARDY, not to head dive from the floating dock;

(e) They failed to control the use of said floating dock and failed to warn against unsafe activities by the minor users of said dock, specifically the minor plaintiff herein;

(f) Despite the knowledge of defendants that the minor users of their floating dock and the minor plaintiff were engaged in diving activities on the intercoastal waterway where the accident occurred, said defendants failed to take such necessary precautions or give adequate warnings and instructions regarding the hidden hazards of such activity under certain circumstances of an unusually low tide;

(g) They failed to warn the minor plaintiff herein of the dangers of diving;

(h) They failed to warn the minor plaintiff of the changing tide conditions;

(i) They failed to install adequate controls, measuring sticks and other devices to reflect the accurate depth of the water around the floating dock;

(j) They failed to adequately patrol the area;

(k) They failed to take other reasonable, adequate and necessary measures and precautions to prevent diving and resultant serious injuries;

(l) They failed to correct or render safe said unsafe, negligent, hazardous and dangerous condition at the accident site location although said condition constituted a trap that would not be reasonably apparent to and would not be anticipated by the minor plaintiff or

other persons exercising due care and which hazards and dangerous condition created a reasonably foreseeable risk of the kind of the injury herein alleged;

(m) Defendants had actual or constructive knowledge of the existence of said condition and knew or, in the exercise of reasonable care, should have known of the hazardous and dangerous condition at said accident location for a sufficient period of time to have taken measures against such hazardous and dangerous condition but they failed to do so;

(n) Defendants failed to exercise ordinary care for the protection of one of tender years, specifically the minor plaintiff, after her presence in a dangerous situation was known or should have been known;

(o) That defendants, knowing that the minor plaintiff was engaged in this diving activity and knowing that this was a dangerous activity because of the condition of the dock and the surrounding waters, were negligent in that defendants failed to take into account the fact that the minor plaintiff was a child and failed to regulate their conduct accordingly; and

(p) That defendants negligently, consciously, recklessly or otherwise tortiously failed to warn or put the minor plaintiff on notice that the aforementioned floating dock was a floating dock that rose and fell with the tides thereby creating an illusion that the water level remained unchanged as the minor plaintiff prior to August 19, 1994 had never experienced such an unusually low tide as existed on August 19, 1994.

14. The aforementioned conduct of defendants in failing to warn the minor plaintiff of the aforementioned hidden and highly hazardous conditions constituted gross, willful, wanton, reckless and outrageous conduct amounting to gross negligence and entitling the minor plaintiff to recover punitive damages from the defendants.

15. The hereinabove described accident location was in a hazardous and dangerous condition because of a

combination of environmental and weather factors existing thereupon, which condition created a substantial risk of injury to the minor plaintiff at said location, which risk was reasonably foreseeable by the defendants.

16. That defendants, with full knowledge of the minor plaintiff's age and lack of appreciation of danger, and with knowledge that minor plaintiff had engaged in the diving activities on various occasions in the past nevertheless engaged in the negligent conduct herein alleged.

17. That, although other children on previous occasions had engaged in the diving activity at their dock, defendants failed to post warning signs and failed in any way or manner whatsoever to warn the minor plaintiff and other young children of the danger of said diving activities.

18. That defendants had superior knowledge of the condition of the floating dock and of the affects of tidal and environmental changes on the depth of the water surrounding the floating dock and, having said superior knowledge nonetheless failed to adequately warn the minor plaintiff of all the potential dangers inherent in head-first diving from said floating dock.

19. As a direct and proximate result of said tortious acts, omissions and conduct of defendants, plaintiff, ELIZABETH H. HARDY, was injured while diving from the dock owned by the defendants and sustained and incurred and is certain in the future to sustain and incur losses, injuries and damages as a result of her paralysis itemized as follows:

(a) Disabling and serious personal injuries, mental and physical pain, suffering and anguish in connection therewith;

(b) Expenditures for past, present and future medical services and other items in connection with the treatment of plaintiff's said injuries for the rest of her life;

(c) Loss and impairment of plaintiff's earnings, income and earning capacity; and

(d) Plaintiff's ability to fully enjoy the remainder

of life.

SECOND CLAIM FOR RELIEF

20. Plaintiffs reallege and incorporate herein by reference the allegations contained in paragraphs 1 through 19 of the First Claim for Relief as though fully set forth herein.

21. As a direct and proximate result of the negligence of defendants, plaintiffs have suffered and continue to suffer great mental anguish and anxiety which are the immediate and necessary consequences of said injuries.

22. As a direct and further result of defendants' negligence, plaintiffs have incurred and will continue to incur medical expenses for diagnoses, treatment, medication and care of ELIZABETH H. HARDY, which are the immediate and necessary consequences of said injuries suffered by ELIZABETH H. HARDY, all in an amount in excess of FIFTY THOUSAND AND NO/100 DOLLARS ($50,000.00).

WHEREFORE, plaintiffs pray the court as follows:

1. That plaintiffs have and recover damages in an amount in excess of FIFTY THOUSAND DOLLARS ($50,000.00) FOR ACTUAL DAMAGES;

2. That plaintiffs have and recover punitive damages in excess of FIFTY THOUSAND DOLLARS ($50,000.00);

3. For attorney's fees and costs incurred;

4. For such other and further relief as this honorable court may deem just and proper; and

5. TRIAL BY JURY IS HEREBY DEMANDED.

This the 27th day of March, 1995.

ANDERSON, COX & ENNIS
BY: s/Henry L. Anderson, Jr.
HENRY L. ANDERSON, JR.
State Bar Number: 100
Attorney for Plaintiffs
Post Office Box 1166
Wrightsville Beach, NC 28480
Telephone: (910) 256-5577

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

CIVIL ACTION NUMBER: 7-95-CV-44 F3

FILED May 4 '95
David W. Daniel, Clerk
U.S. District Court
Raleigh, No. Car.

LEE JETER BROCK, Guardian Ad Litem for ELIZABETH H. HARDY, minor, and LEE JETER BROCK, Individually,	)
Plaintiffs	)
vs.	**MOTION TO DISMISS**
FORREST RAY LEWIS and JAN LEWIS,	)
Defendants	)

NOW COME Defendants, FORREST RAY LEWIS and JAN LEWIS, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure and move that this action should be dismissed on the ground that this court lacks subject matter jurisdiction.

This the 3d day of May, 1995.

Forrest Ray Lewis and Jan Lewis,
By and Through Their Attorneys
MARSHALL, WILLIAMS & GORHAM, LLP
By: s/ William Robert Cherry, Jr.
14 South Fifth Street
P. O. Drawer 2088

Wilmington, North Carolina 28402
(910) 763-9891
State Bar #7655

By: s/ John L. Coble
14 South Fifth Street
P. O. Drawer 2088
Wilmington, North Carolina 28402
(910) 763-9891

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a copy of the foregoing Motion to Dismiss was duly served upon each party to this cause by depositing same in a postpaid wrapper in a post office or official depository under the exclusive care and custody of the U.S. Postal Service, properly address as follows:

Henry L. Anderson, Jr.
ANDERSON, COX & ENNIS
P. O. Box 1166
Wrightsville Beach, NC 28480

This the 3d day of May, 1995.

s/ John L. Coble
of MARSHALL WILLIAMS & GORHAM, LLP
14 S. Fifth St./P.O. Drawer 2088
Wilmington, North Carolina 28402
Telephone: (910) 763-9891

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

CIVIL ACTION NUMBER: 7-95-CV-44 F3

RECEIVED May 23 '95
U.S. District Court
Wilmington, North Carolina

LEE JETER BROCK, Guardian Ad Litem for ELIZABETH H. HARDY, minor, and LEE JETER BROCK, Individually,

Plaintiffs

v.

FORREST RAY LEWIS and JAN LEWIS,

Defendants

SUBSTITUTE/AMENDED COMPLAINT
(ADDITION OF LUCY LEWIS AS A DEFENDANT)

The Plaintiffs, prior to answer being filed by Defendant, by and through counsel, complaining of the Defendants, herewith file this Substitute/Amended Complaint adding Lucy Lewis as a named party Defendant and allege as follows:

FIRST CLAIM FOR RELIEF

1. Plaintiffs are citizens and residents of the State of North Carolina, Pender County, and the minor Plaintiff, ELIZABETH H. HARDY, is a minor (D.O.B. 9-

27-79) represented in this action by her Guardian Ad Litem, her mother, who has care, custody and control of said minor.

2. Defendants are citizens and residents of the County of Pender, State of North Carolina, residing in a home situated on the IntraCoastal Waterway which is equipped with a pier and an attached floating dock which extends into and services the navigable waters of the IntraCoastal Waterway.

3. The wrongs herein involved occurred on navigable waters and bear significant relationship to traditional maritime activity and plaintiffs hereby designate and deem this action to be an admiralty matter under Rule 9(h) of the Federal Rules of Civil Procedure.

4. At all times relevant herein, defendants, FORREST RAY LEWIS and JAN LEWIS, were the owners of the aforementioned home, its surrounding land and a pier with an attached floating dock which led into and serviced the IntraCoastal Waterway and Defendant LUCY LEWIS is the daughter of Defendants FORREST RAY LEWIS and JAN LEWIS and presently resides at the aforementioned home and has so resided for the majority of her life.

5. Defendants have lived in the aforementioned residence and have maintained the pier and floating dock herein involved for in excess of ten (10) years and are familiar with the tidal changes common to the area.

6. The minor plaintiff had used defendant's floating dock with their knowledge and permission sporadically for approximately six weeks prior to August 19, 1994.

7. On August 19, 1994, the plaintiff, ELIZABETH H. HARDY, was an invited guest at the aforementioned home owned by the defendants and was using the aforementioned floating dock and on said date at approximately 3 o'clock p.m. and, unknown to the minor plaintiff, the tides were extremely low and the depth of the water at the end of the floating dock was

approximately twelve (12) inches deep.

8. At all times relevant herein, defendants had full knowledge that the minor plaintiff had regularly used the floating dock and had dove from the floating dock on a number of occasions and had been present at the dock during said dives and had acquiesced thereto.

9. On this occasion, plaintiff ELIZABETH H. HARDY, had arrived at the defendants' floating dock via a pleasure boat traveling on the IntraCoastal Waterway with various other boats.

10. At the time of the injuries herein involved, the minor plaintiff, ELIZABETH HARDY, was in the process of boarding a boat/vessel pursuant to the commands and directions of the captain of said boat, Defendant LUCY LEWIS, that was in and on and underway in the navigable channel of the IntraCoastal Waterway near Red Marker 100.

11. At the time the injuries were sustained, the minor plaintiff dove from the defendants' floating dock into the navigable channel of the IntraCoastal Waterway at the command, direction and urging of Defendant captain LUCY LEWIS who was then the captain and operator of the vessel that was underway in the navigable channel of the IntraCoastal Waterway and which the minor plaintiff was in the process of boarding.

12. On August 19, 1994, at approximately 3:00 p.m., the plaintiff, ELIZABETH H. HARDY, fourteen (14) years old, dove off the aforementioned floating dock into the waters of the IntraCoastal Waterway as aforesaid and immediately struck the sandy bottom of the waterway with her head and was rendered a quadriplegic.

13. That defendants were negligent in the following respects:

(a) Defendants knew or should have known that around the floating dock it was not unusual to experience excessively low tides several times per year created by known environmental and gravitational influences and that these extreme low tides created a hidden, latent, defect

and trap at the end of the floating dock referred to herein that ordinarily was not present, and the defendants knew that one could not normally see more than one to two inches in depth in the IntraCoastal Waterway due to the coffee color consistency of the water;

(b) They negligently, consciously, recklessly or otherwise tortiously owned, managed, possessed, entrusted, maintained, repaired, had designed, inspected or equipped the aforementioned floating dock on defendants' property;

(c) They negligently, consciously, recklessly or otherwise tortiously owned, managed, possessed and trusted, maintained, repaired, had designed, inspected or equipped a boarding facility used, among other things, for the boarding of vessels on the navigable channel of the IntraCoastal Waterway;

(d) They failed to adequately instruct, advise, warn or supervise minor users, and specifically the minor plaintiff, ELIZABETH H. HARDY, or occupants of said floating dock, specifically, the minor plaintiff, ELIZABETH HARDY, not to head dive from the floating dock;

(e) They failed to control the use of said floating dock and failed to warn against unsafe activities by the minor users of said dock, specifically the minor plaintiff herein;

(f) Despite the knowledge of defendants that the minor users of their floating dock and the minor plaintiff were engaged in diving activities on the intercoastal waterway where the accident occurred, said defendants failed to take such necessary precautions or give adequate warnings and instructions regarding the hidden hazards of such activity under certain circumstances of an unusually low tide;

(g) They failed to warn the minor plaintiff herein of the dangers of diving;

(h) They failed to warn the minor plaintiff of the changing tide conditions;

(i) They failed to install adequate controls,

measuring sticks and other devices to reflect the accurate depth of the water around the floating dock;

(j) They failed to adequately patrol the area;

(k) They failed to take other reasonable, adequate and necessary measures and precautions to prevent diving and resultant serious injuries;

(l) They failed to correct or render safe said unsafe, negligent, hazardous and dangerous condition at the accident site location although said condition constituted a trap that would not be reasonably apparent to and would not be anticipated by the minor plaintiff or other persons exercising due care and which hazards and dangerous condition created a reasonably foreseeable risk of the kind of the injury herein alleged;

(m) Defendants had actual or constructive knowledge of the existence of said condition and knew or, in the exercise of reasonable care, should have known of the hazardous and dangerous condition at said accident location for a sufficient period of time to have taken measures against such hazardous and dangerous condition but they failed to do so;

(n) Defendants failed to exercise ordinary care for the protection of one of tender years, specifically the minor plaintiff, after her presence in a dangerous situation was known or should have been known;

(o) That defendants, knowing that the minor plaintiff was engaged in this diving activity and knowing that this was a dangerous activity because of the condition of the dock and the surrounding waters, were negligent in that defendants failed to take into account the fact that the minor plaintiff was a child and failed to regulate their conduct accordingly; and

(p) That defendants negligently, consciously, recklessly or otherwise tortiously failed to warn or put the minor plaintiff on notice that the aforementioned floating dock was a floating dock that rose and fell with the tides thereby creating an illusion that the water level remained unchanged as the minor plaintiff prior to August 19, 1994

had never experienced such an unusually low tide as existed on August 19, 1994.

14. That Defendant LUCY LEWIS was further negligent in the following respects:

(a) LUCY LEWIS, as captain of the vessel which ELIZABETH HARDY was attempting to board, negligently, carelessly and recklessly commanded and urged ELIZABETH HARDY to dive into the navigable waters of the IntraCoastal Waterway from the floating dock for the purpose of boarding said vessel.

(b) Defendant LUCY LEWIS was negligent in commanding ELIZABETH HARDY to board said vessel in the manner so prescribed, to wit, by diving into the IntraCoastal Waterway, when she knew, or should have known, that such a command to board the vessel in such a manner constituted a dangerous and hazardous act and/or method of boarding said vessel under the circumstances then and there existing, to wit, extremely shallow water due to unusually low tides.

(c) Defendant LUCY LEWIS failed to warn ELIZABETH HARDY of said shallow condition and failed to warn ELIZABETH HARDY not to dive and not to attempt to board said vessel of which she was in command by utilizing a diving method as a way to so board.

15. The aforementioned wrongful acts of LUCY LEWIS concurred with the negligence of FORREST RAY LEWIS and JAN LEWIS in causing the injury to ELIZABETH HARDY and therefore liability is imposed upon FORREST RAY LEWIS and JAN LEWIS for the wrongful act of their child, LUCY LEWIS.

16. FORREST RAY LEWIS and JAN LEWIS were further negligent in that they had the ability and opportunity to control the actions of LUCY LEWIS and knew, or should have known, of the necessity for exercising such control and failed to adequately exercise such control and it was foreseeable that such failure could lead to an injury such as the one suffered by

ELIZABETH HARDY.

17. FORREST RAY LEWIS and JAN LEWIS were further negligent in that they ratified, condoned, acquiesced and, by their acts of acquiescence, encouraged their daughter, Defendant LUCY LEWIS, to engage in the aforesaid acts of negligence. Such ratification, acquiescence and encouragement constitute negligent supervision of their daughter, LUCY LEWIS, and thereby negligent supervision and maintenance of the floating dock in the area around same. By allowing such action by LUCY LEWIS on and around their floating dock, the Defendants, FORREST RAY LEWIS and JAN LEWIS were negligent.

18. FORREST RAY LEWIS and JAN LEWIS were further negligent in that they knew or should have known that LUCY LEWIS was guilty of the aforesaid alleged negligence and allowed aforesaid negligence to be conducted around their own floating dock and by allowing such acts of negligence by their daughter, LUCY LEWIS, who was under their supervision and control, said acts of negligence of LUCY LEWIS constituting a dangerous condition on or about the floating dock, said acts of negligence of LUCY LEWIS are thereby imputed to her parents, FORREST RAY LEWIS and JAN LEWIS, owners of the floating dock.

19. The aforementioned conduct of defendants in failing to warn the minor plaintiff of the aforementioned hidden and highly hazardous conditions constituted gross, willful, wanton, reckless and outrageous conduct amounting to gross negligence and entitling the minor plaintiff to recover punitive damages from the defendants.

20. The hereinabove described accident location was in a hazardous and dangerous condition because of a combination of environmental and weather factors existing thereupon, which condition created a substantial risk of injury to the minor plaintiff at said location, which risk was reasonably foreseeable by the defendants.

21. That defendants, with full knowledge of the minor plaintiff's age and lack of appreciation of danger, and with knowledge that minor plaintiff had engaged in the diving activities on various occasions in the past nevertheless engaged in the negligent conduct herein alleged.

22. That, although other children on previous occasions had engaged in the diving activity at their dock, defendants failed to post warning signs and failed in any way or manner whatsoever to warn the minor plaintiff and other young children of the danger of said diving activities.

23. That defendants had superior knowledge of the condition of the floating dock and of the affects of tidal and environmental changes on the depth of the water surrounding the floating dock and, having said superior knowledge nonetheless failed to adequately warn the minor plaintiff of all the potential dangers inherent in head-first diving from said floating dock.

24. As a direct and proximate result of said tortious acts, omissions and conduct of defendants, plaintiff, ELIZABETH H. HARDY, was injured while diving from the dock owned by the defendants and sustained and incurred and is certain in the future to sustain and incur losses, injuries and damages as a result of her paralysis itemized as follows:

(a) Disabling and serious personal injuries, mental and physical pain, suffering and anguish in connection therewith;

(b) Expenditures for past, present and future medical services and other items in connection with the treatment of plaintiff's said injuries for the rest of her life;

(c) Loss and impairment of plaintiff's earnings, income and earning capacity; and

(d) Plaintiff's ability to fully enjoy the remainder of life.

SECOND CLAIM FOR RELIEF

25. Plaintiffs reallege and incorporate herein by

reference the allegations contained in paragraphs 1 through 24 of the First Claim for Relief as though fully set forth herein.

26. As a direct and proximate result of the negligence of defendants, plaintiffs have suffered and continue to suffer great mental anguish and anxiety which are the immediate and necessary consequences of said injuries.

27. As a direct and further result of defendants' negligence, plaintiffs have incurred and will continue to incur medical expenses for diagnoses, treatment, medication and care of ELIZABETH H. HARDY, which are the immediate and necessary consequences of said injuries suffered by ELIZABETH H. HARDY, all in an amount in excess of FIFTY THOUSAND AND NO/100 DOLLARS ($50,000.00).

WHEREFORE, Plaintiffs pray the court as follows:

1. That Plaintiffs have and recover damages in an amount in excess of FIFTY THOUSAND DOLLARS ($50,000.00) FOR ACTUAL DAMAGES;

2. That Plaintiffs have and recover punitive damages in excess of FIFTY THOUSAND DOLLARS ($50,000.00);

3. For attorneys' fees and costs incurred;

4. For such other and further relief as this honorable court may deem just and proper; and

5. TRIAL BY JURY IS HEREBY DEMANDED.

This the 23rd day of May, 1995.

ANDERSON, COX & ENNIS

By: s/ Henry L. Anderson, Jr.
HENRY L. ANDERSON, JR.
State Bar Number: 100
Attorney for Plaintiffs
P.O. Box 1166
Wrightsville Beach, NC 28480
Telephone: (910) 256-5577

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *SUBSTITUTE/ AMENDED COMPLAINT* was this day served upon the Defendants' counsel of record by mailing a copy of such instrument, postage prepaid, first class mail, to the office address of:

John L. Coble, Esquire
MARSHALL, WILLIAMS & GORHAM, L.L.P.
P.O. Drawer 2088
Wilmington, NC 28402-2058

This the 23rd day of May, 1995.

s/Henry L. Anderson, Jr.
HENRY L. ANDERSON, JR.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

CIVIL ACTION NUMBER: 7-95-CV-44 F

FILED Jun 8 '95
David W. Daniel, Clerk
U.S. District Court
Raleigh, No. Car.

LEE JETER BROCK, ET AL.,	)
	)
Plaintiffs	)
	)
v.	**MOTION TO DISMISS**
	)
FORREST RAY LEWIS and JAN LEWIS,	)
	)
Defendants	)

NOW COME Defendants, FORREST RAY LEWIS, JAN LEWIS and LUCY LEWIS, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure and renew the May 4, 1995 Motion To Dismiss this action on the ground that this court lacks subject matter jurisdiction to hear this matter. In support hereof, defendants rely upon the memorandums previously filed with the court.

This the 8th day of June, 1995.

Forrest Ray Lewis and Jan Lewis,
By and Through Their Attorneys
MARSHALL, WILLIAMS & GORHAM, LLP
By: s/ William Robert Cherry, Jr.
14 South Fifth Street
P. O. Drawer 2088

Wilmington, North Carolina 28402
(910) 763-9891
State Bar #7655

By: s/ John L. Coble
14 South Fifth Street
P. O. Drawer 2088
Wilmington, North Carolina 28402
(910) 763-9891

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a copy of the foregoing Motion to Dismiss was duly served upon each party to this cause by depositing same in a postpaid wrapper in a post office or official depository under the exclusive care and custody of the U.S. Postal Service, properly address as follows:

Henry L. Anderson, Jr.
ANDERSON, COX & ENNIS
P. O. Box 1166
Wrightsville Beach, NC 28480

This the 8th day of June, 1995.

s/ John L. Coble
of MARSHALL WILLIAMS & GORHAM, LLP
14 S. Fifth St./P.O. Drawer 2088
Wilmington, North Carolina 28402
Telephone: (910) 763-9891

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

FILED Jun 19 '95
David W. Daniel, Clerk
U.S. District Court
Raleigh, No. Car.

LEE JETER BROCK, Guardian Ad Litem for ELIZABETH H. HARDY, minor, and LEE JETER BROCK, Individually,
Plaintiffs,

v.

FORREST RAY LEWIS, JAN LEWIS and LUCY LEWIS,
Defendants.

JUDGMENT IN A CIVIL CASE
CIVIL CASE NO. 7-95-CV-44 F3

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED the court concludes that no admiralty jurisdiction exists in this case, and therefore, the court is without subject matter jurisdiction. Pursuant to Rule 12(b)(1), the defendant's Motion to Dismiss is ALLOWED, and this action is DISMISSED.

THE ABOVE JUDGMENT WAS ENTERED TODAY, June 19, 1995, AND A COPY MAILED TO:

Henry L. Anderson, Esq.
PO Box 1166
Wrightsville Beach, NC 28480

William Robert Cherry, Esq.
PO Box 2088
Wilmington, NC 28402

John Coble, Esq.
14 S. 5th Street
Wilmington, NC 28401

June 19, 1995
Date

DAVID W. DANIEL
Clerk

C. VanCampen
(By) Deputy Clerk

Wilmington, North Carolina

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
No. 7:95-CV-44-F

FILED Jun 19 '95
David W. Daniel, Clerk
U.S. District Court
Raleigh, No. Car.

LEE JETER BROCK, Guardian Ad Litem for ELIZABETH H. HARDY, minor, and LEE JETER BROCK, Individually,
Plaintiffs,

v.

FORREST RAY LEWIS, JAN LEWIS and LUCY LEWIS,
Defendants.

ORDER

This matter is before the court on the defendants' Motion to Dismiss, pursuant to Rule 12(b)(1), Fed. R. Civ. P., for lack of subject matter jurisdiction. The plaintiffs have filed a Response to which defendants have replied. The matter is ripe for disposition.

BACKGROUND FACTS

On August 19, 1994, the fourteen-year-old plaintiff, Elizabeth H. Hardy, rode her Wave Runner[1] up the Intracoastal Waterway (ICW) in Pender County, North Carolina, to visit her friend, Lucy Lewis. Lucy lived with her parents in a home on the ICW, which has a pier and attached floating dock extending into the ICW. Elizabeth

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1 Wave Runner is a brand name for a personal watercraft, also commonly called a "jet ski."

arrived the pier at about 3:00 p.m.; the tides were very low and the water was only about 12 inches deep at the end of the floating dock.

Elizabeth secured her Wave Runner to the floating dock and, shortly thereafter, thirteen-year-old Lucy boarded and drove it out into the ICW, while Elizabeth lay sunbathing on the floating dock. Shortly, Lucy returned to the floating dock aboard the Wave Runner and, from ten to fifteen feet away from the dock, called out to Elizabeth, urging her to dive from the floating dock to join her on the Wave Runner.

Before this occasion, Elizabeth had used and dived from the Lewises' floating dock on numerous occasions. On all of the prior occasions, the water never had been more shallow than four feet. However, on this particular occasion, the murky water was only 12 inches deep. After she dove off the dock, Elizabeth was rendered quadriplegic when her head struck the sand at the bottom.

Plaintiffs initially sued only Forrest Ray and Jan Lewis for negligence in 16 different respects, the gravamen of which was that, although they had full knowledge of Elizabeth's use of the dock and acquiesced in that use, they failed to supervise or warn or instruct or control Elizabeth's activities at the dock. Plaintiffs further alleged, inter alia that the defendants knew or should have known of the unusually low tide

> created by known environmental and gravitational influences and that these extreme low tides created a hidden, latent, defect and trap at the end of the floating dock . . . that ordinarily was not present, and the defendants knew that one could not normally see more than one to two inches in depth in the [ICW] due to the coffee color consistency of the water.

Complaint at ¶ 13(a).

Plaintiffs have amended their complaint as of right to include claims against Lucy, whom they allege, inter

alia, as "captain of the vessel Elizabeth was attempting to board," "commanded" Elizabeth to dive from the dock into "the navigable waters of the [ICW]. . . for the purpose of boarding said vessel." Plaintiffs also claim Lucy had a duty to warn Elizabeth of the shallow conditions of which Lucy should have known. Plaintiffs have added further allegations against the Lewises for their alleged negligent failure to supervise or control Lucy, and contend that they therefore are liable for Lucy's negligence. Plaintiffs seek actual, as well as punitive, damages from the defendants. The matter currently is before the court on defendants' Motion to Dismiss for lack of subject matter jurisdiction, in that defendants allege the case improperly has been brought in admiralty.

ANALYSIS

Federal admiralty jurisdiction is granted under Article III, Section 2 of the United States Constitution, which extends to "all cases of admiralty and maritime jurisdiction." District courts have original jurisdiction of civil matters arising in admiralty pursuant to 28 U.S.C. § 1333(1). Sisson v. Ruby, 497 U.S. 358, 359 (1990). Before 1972, the test for admiralty jurisdiction was based solely upon the locality of the wrong complained of. Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 253-54 (1972) (aviation accident).

In 1972, the Supreme Court announced a new test for admiralty jurisdiction, requiring that, in addition to locality, the wrong must bear a significant relationship to traditional maritime activity. Id. at 268. Thus, the Court articulated a two-part test for determining whether admiralty jurisdiction existed: (1) whether the wrong occurred on navigable waters; and (2) whether the wrong bore a significant relationship to traditional maritime activity. Id.

In 1982, the Court considered the applicability of Executive Jet to a collision of two pleasure boats on navigable water. The Court concluded that, although the pleasure boats had little to do with maritime commerce,

a significant relationship existed because of the potential impact the collision could have on maritime commerce. Foremost Insurance Co. v. Richardson, 457 U.S. 668 (1982).

In 1990, yet another case questioning the propriety of admiralty jurisdiction presented the court with the task of reapplying the Executive Jet analysis to a case in which a fire broke out on a pleasure vessel docked at a marina. The Court, reiterated that "'[n]ot every accident in navigable waters that might disrupt maritime commerce will support federal admiralty jurisdiction.'" Sisson v. Ruby, 497 U.S. at 364 (quoting Foremost, 457 U.S. at 675, N.5). Focusing on the second Executive Jet prong, the Court determined that the fire on the pleasure boat docked at a marina was an accident of a type "likely to disrupt commercial activity," which, in turn, supported a "substantial relationship between the general conduct from which the incident arose to traditional maritime activity." Sisson, 497 U.S. at 364-45.

Most recently, the Supreme Court combined the teachings of this trilogy of cases and explained:

> [A] party seeking to invoke federal admiralty jurisdiction . . . must satisfy conditions both of location and of connection with maritime activity. A court applying the location test must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water. 46 U.S.C. § 740. The connection test raises two issues. A court, first, must "assess the general features of the type of incident involved," [Sisson], 497 U.S. at 363 . . ., to determine whether the incident has "a potentially disruptive impact on maritime commerce," id. at 364, n.2 . . . . Second, a court must determine whether "the general character" of the "activity giving rise to the

> incident" shows a "substantial relationship to traditional maritime activity." Id. at 365, 364, and n.2 . . . .

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., U.S. ___, 115 S. Ct. 1043, 1048 (1995). Thus the inquiry whether a tort has occurred within the admiralty jurisdiction requires the application of two tests -- the "locality" test and the "maritime nexus" or "connection" test, which itself calls for a two-pronged inquiry --(i) what is general character of activity giving rise to incident and (ii) does it have a substantial relationship to traditional maritime activity.

A. Locality

Before Executive Jet, a plaintiff need only demonstrate that his injury occurred "wholly upon the high seas of navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters to be within the admiralty jurisdiction." The Plymouth, 70 U.S. (3 Wall) 20, 35 (1865). Although Executive Jet added the "nexus" requirement, the plaintiff still must establish the locality of the injury as within admiralty jurisdiction.

The defendants herein have advanced the argument that the location test is not met because the tort(s) alleged took place on land. That is, defendants contend any alleged act or omission by the Lewises occurred by virtue of their ownership of the dock, which traditionally has been deemed an extension of land. See Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971); Martin v. West, 222 U.S. 191, 197 (1911).[2]

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[2]This strict rule was modified to a large degree when Congress enacted the Extension of Admiralty Jurisdiction Act, 62 Stat. 496, which provides that "[t]he admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or

However, for purposes of determining the "locality" of a tort in this context, it is not the place where the negligent act occurred that is important; it is the place of injury that controls. Taylor v. Kennedy Engine, Inc., 861 F.2d 127, 128-29 (5th Cir. 1988); Chapman v. City of Grosse Pointe Farms, 385 F.2d 962, 965 (6th Cir. 1967). In the instant case, Elizabeth's injury occurred after diving from the dock.

Courts have had little difficulty finding that injuries sustained when a plaintiff is injured upon diving or falling into navigable water are sufficient to meet the "locality" test. E.g., Foster v. Peddicord, 826 F.2d 1370 (4th Cir. 1987) (plaintiff dove from pleasure boat anchored in navigable water, struck bottom and was injured; however, court concentrated on "nexus" element); In re Bird, 794 F. Supp. 575, 578 n.3 (D.S.C. 1992) (plaintiff injured when thrown overboard from pleasure boat anchored in navigable water; parties agree "locality" test met); Chapman v. City of Grosse Pointe Farms, 385 F.2d at 965 (injury occurred when plaintiff dove from pier into 18 inches of water).

The court concludes, on the authority of the foregoing, and allowing the non-moving parties the benefit of the doubt, that the site where the injury occurred -- within the waters of the navigable ICW -- satisfies the "locality" test. For purposes of the Sisson "locality" test, Elizabeth's injury occurred within the navigable, albeit shallow, waters of the ICW.

B. Maritime Nexus

The more troubling aspect of the admiralty jurisdiction inquiry is whether the general nature of the incident from which an injury arose is such that it is "likely to disrupt commercial activity," and whether a "substantial

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consummated on land." 46 U.S.C. App. § 740. The Act is not implicated here because this case does not involve injury on land caused by a vessel on navigable water.

relationship" exists between the general conduct from which the incident arose and "traditional maritime activity." Sisson, 497 U.S. at 364-65. It is this element of the inquiry which inspires the most litigation and provides the most fertile ground for attempts to ever extend the reach of federal maritime jurisdiction.

The lower courts have attempted to further refine the tricky "nexus" or "connection" test by suggesting various factors which a district court properly may consider, and maritime jurisdiction jurisprudence has taken on a life of its own. See, e.g., Bonnette v. Shell Offshore, Inc., 838 F. Supp. 1175 (S.D. Tex. 1993). In Oman v. Johns-Manville Corp., 764 F.2d 224 (4th Cir.), cert. denied, 474 U.S. 970 (1985), the Fourth Circuit Court of Appeals adopted the four-prong test, announced in Kelly v. Smith, 485 F.2d 520 (5th Cir. 1973), cert. denied, 416 U.S. 969 (1974), and applied it in Foster v. Peddicord, 826 F.2d 1370 (4th Cir. 1987), cert. denied, 484 U.S. 1027 (1988). Under the Kelly/Oman test, the district court should consider four factors in determining whether the alleged wrong meets the Executive Jet nexus test. Those factors are:

(1) the functions and roles of the parties;
(2) the type of vehicles and instrumentalities involved;
(3) the causation and type of injury; and
(4) traditional concepts of the role of admiralty law.

Foster, 826 F.2d at 1375 (quoting Oman, 764 F.2d at 230). See also Price v. Price, 929 F.2d 131, 135 (4th Cir. 1991) ("examination of the factors which we identified in Bubla [v. Bradshaw, 795 F.2d 349 (4th Cir. 1986)] and Oman is still an acceptable systematic method for making the analysis").

The Fifth Circuit Court of Appeals, in Molett v. Penrod Drilling Co., 826 F.2d 1419 (5th Cir. 1987) ("Molett I"), cert. denied 493 S. Ct. 1003 (1989), supplemented the four-part Kelly test, purportedly to

accommodate the Supreme Court's decision in Foremost. Molett I suggests that:

> indicia of maritime flavor can be found in: (1) the impact of the event on maritime shipping and commerce; (2) the desirability of a uniform national rule to apply to such matters; and (3) the need for admiralty "expertise" in the trial and decision of the case.

Molett I, 826 F.2d 1419, 1426. Although a different Fifth Circuit panel later appeared to ignore the Molett I in deciding the jurisdiction question as to a different defendant in Molett v. Penrod Drilling Co., 872 F.2d 1221 (5th Cir.) ("Molett II"), cert. denied, 493 S. Ct. 1003 (1989), and the efficacy of the factors-application method is questionable, at best, since Grubart, 115 S. Ct. at 1055 (rejecting request to adopt multifactor test for admiralty jurisdiction "for benefit of land-based parties to a tort action"), an examination of the Fifth Circuit factors as applied to these facts tends to confirm the same common-sense result produced by the Sisson test.

Kelly/Oman Analysis

The first Kelly/Oman factor is the functions, roles and relationship of the parties. Here, as in Bird and Foster, for example, the relationship of the parties was recreational. Plaintiffs have gone to great lengths to couch all their pleadings and arguments in the strictest of maritime lingo. Referring to a 13-year-old girl sitting on her buddy's Wave Runner a few feet from her family's pier on the ICW, the plaintiffs proclaim:

> That captain LUCY LEWIS negligently, carelessly and recklessly commanded ELIZABETH to board the vessel by diving into the Intracoastal Waterway wherein she was to become a passenger of the vessel (Wave Runner) which was to be operated into and about the Intracoastal Waterway....
>
> * * * *

> The shallowness [of the water] was more shallow than ELIZABETH had ever known or experienced, but said shallowness was known, or should have been known, to captain LUCY LEWIS in that, on a number of occasions per year, during prior years, such conditions had occurred, due to the increased gravitational pull on the earth because of the alignment of the moon and the sun to the earth, the tidal changes and the direction and force of the wind . . . .

Plaintiffs' Response to Defendant's Motion at 3, 4. Any suggestion that "captain" Lucy's "commanding" Elizabeth to "board the vessel" transforms the girls' roles, functions or relationship into anything other than friends engaging in recreation, is absurd. See Foster, 826 F.2d at 1375 ("[t]o move from this to an analogy of the relationship between a captain of a merchant vessel and his passengers or crew members is simply inappropriate under these circumstances.").

Plaintiffs have attempted to distinguish Delta Country Ventures, Inc. v. Magna, 986 F.2d 1260 (9th Cir. 1993) (diving accident not within the admiralty jurisdiction), and Foster v. Peddicord, 826 F.2d 1370 (4th Cir. 1987) (same), cert. denied, 484 U.S. 1027 (1988), by arguing that Delta and Foster involved merely recreational diving, while the diving in the instant case "was not for diving per se, it served a function . . . boarding of the Wave Runner." Response at 21. Characterizing Elizabeth's presumed "intent" to "board a vessel" as grounds for establishing a substantial relationship with traditional maritime activity, is a stretch, at best. Nor may invocation of terms such as "captain Lucy," "commanding" and "boarding a vessel" -- literally or figuratively -- confer federal admiralty jurisdiction on child's play.

The second Kelly/Oman factor is the type of vehicles and instrumentalities involved. As much as

plaintiffs wish to focus on the Wave Runner as a "vessel," such characterization is unnecessary, because the Wave Runner was not involved in any relevant way with Elizabeth's injury. The only instrumentality with any possible relevance in this case is the floating dock from which Elizabeth dove. Wisely, neither party has attempted to attribute vessel status to the dock.[3]

The third Kelly/Oman factor is the causation and type of injury. For purposes of the instant motion, the proximate cause of Elizabeth's injury was her dive from the pier into 12 inches of water.[4] The "type of injury" is the personal injury she suffered when her head struck the bottom of the ICW. This scenario regularly has been found not to support admiralty jurisdiction.

In Foster, 826 F.2d at 1375, the Fourth Circuit Court of Appeals noted:

> The [Foremost] opinion stated, however, that "[n]ot every accident in navigable waters that might disrupt maritime

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[3]However, plaintiffs have made an argument, addressed to the "locality" prong of the test, to the effect that the floating dock is not "permanent," and that its construction permits it to move with the tides. Defendants have supplied Mrs. Lewis' affidavit in which she has states, "The pier which extends from my property into the Intracoastal Waterway and which is in issue in this lawsuit is constructed with a floating dock permanently affixed thereto. . . The floating dock became a feature of the pier when the pier was originally constructed."

[4]See Grubart, 115 S. Ct. at 149-50 ("any litigation of a contested subject-matter jurisdictional fact issue occurs in comparatively summary procedure before a judge alone. . . . There is no reason why this should not be just as true for proximate causation as it is for the maritime nature of the tortfeasor's activity giving rise to the incident") (citations omitted).

> commerce will support federal admiralty jurisdiction" . . . .; "claims by swimmers injured by . . . submerged objects in shallow waters," . . . gained no more ground under the Court's analysis in Foremost than under Executive Jet.

(Citations omitted). The causation and type of injury in this case do not support a finding of admiralty jurisdiction.

The fourth and final Kelly/Oman factor is traditional concepts of the role of admiralty law. The Fourth Circuit Court of Appeals has described this as the "most important factor," Oman 764 F.2d at 231, and has defined those concepts as follows:

> Admiralty has been traditionally concerned with federalism, uniformity, and the regulation of navigable waterways, as well as the specifics of "maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage."

Foster, 826 F.2d at 1376 (quoting Executive Jet, 409 U.S. at 270).

As in Foster,

> [r]educed to its essence, this case is about swimming and diving, and an unfortunate accident that resulted in the course of a recreational outing . . . . It is not about piloting, shipping, or navigational error, or other aspects of traditional maritime activity. There is simply no predicative relationship upon which an otherwise typical tort claim may properly be described as relating to "matters with which admiralty is basically concerned."

Id. Significantly, the Supreme Court very recently has cited Chapman v. Grosse Pointe Farms, 385 F.2d 962 (6th

Cir. 1967) for the proposition, "no admiralty jurisdiction over claim of swimmer who injured himself when diving off pier into shallow but navigable water." Grubart, 115 S. Ct. at 1053.

Of course, an actual effect on maritime commerce is not required in order that a nexus with maritime activities be established. Sisson, 497 U.S. at 363 (incident must be potentially disruptive of maritime commerce but potential impact must be determined by general character of incident, not the actual effects). However, the general character of this incident -- determined at an "intermediate level" of possible generality, Grubart, 115 S. Ct. at 1051 -- is that of a girl diving from a private pier into navigable water. The court concludes that such an incident simply is not one which potentially would create an impact disruptive of maritime commerce. See White v. United States, __ F.3d __ (1995 WL 265413) (4th Cir. May 9, 1995) (citing Executive Jet, 409 U.S. 249 (swimming too attenuated a relationship to traditional maritime activity); accord Grubart, 115 S. Ct. at 1051.

Molett I Factors

The "supplementary" Molett I factors tend to support a finding that admiralty jurisdiction does not exist on the facts of this case. As to the first of those factors, the court already has determined that the general nature of the event which resulted in injury does not have the potential to disrupt maritime commerce. Nor does the court perceive any particular desirability for a "uniform national rule" to apply to injuries incurred in recreational diving from a dock or pier. Likewise, there has been no suggestion that any admiralty or maritime expertise will be required -- or even helpful -- in the trial of this case.

Grubart Test

Questioning the practicability of the multifactor tests developed in the Fifth Circuit, the Supreme Court in Grubart opined that the Sisson tests are produce an adequate result and are less complicated to apply. "If the tort produces no potential threat to maritime commerce

or occurs during activity lacking a substantial relationship to traditional maritime activity, Sisson assumes that the objectives of admiralty jurisdiction probably do not require its exercise, even if the location test is satisfied." Grubart, 115 S. Ct. at 1053-54. The foregoing discussion reveals that a straightforward Sisson analysis yields the same results as does the multifactor approach.

SUMMARY

In summary, then, even if it can be said that the "locality" test could be met, the court can perceive of no serious argument and analysis which would support a maritime nexus with the events resulting in Elizabeth's injury. For the foregoing reasons, the court concludes that no admiralty jurisdiction exists in this case, and, therefore, the court is without subject matter jurisdiction. Pursuant to Rule 12(b)(1), the defendants' Motion is ALLOWED, and this action is DISMISSED.

SO ORDERED.
This 16th day of June, 1995.

s/James C. Fox
JAMES C. FOX
United States District Judge

I certify the foregoing to be a true and correct copy of the original.
David W. Daniel, Clerk
United States District Court
Eastern District of North Carolina
By C. VanCampen
Deputy Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LEE JETER BROCK, Guardian Ad Litem for Elizabeth H. Hardy, a Minor; LEE JETER BROCK, Individually, *Plaintiffs-Appellants,*	:	
v.	:	No. 95-2302
FORREST RAY LEWIS; JAN LEWIS; LUCY LEWIS, *Defendants-Appellees.*	:	

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
James C. Fox, Chief District Judge.
(CA-95-44-7-F)

Argued: March 7, 1996

Decided: May 24, 1996
Before MURNAGHAN and ERVIN, Circuit Judges, and
BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Henry London Anderson, Jr., ANDERSON, COX & ENNIS, Wrightsville Beach, North Carolina, for Appellants. John Lloyd Coble, MARSHALL, WILLIAMS & GORHAM, Wilmington, North Carolina, for Appellees. ON BRIEF: William Robert Cherry, Jr., MARSHALL,

WILLIAMS & GORHAM, Wilmington, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Fourteen-year-old Elizabeth Hardy visited her friend Lucy Lewis at Lucy's parents' home situated on the Intracoastal Waterway in North Carolina. Elizabeth dove off a dock belonging to the Lewises and extending from a pier into the Waterway, which is undisputedly a maritime location. She had on numerous occasions before as a visitor to the Lewises' home made such dives. But this time, the depth of the water where Elizabeth dove was approximately one foot instead of the usual four feet, so she struck bottom and badly injured herself. Elizabeth and her mother, Lee Jeter Brock, sued the Lewises in federal district court. Diversity did not exist, but they asserted federal jurisdiction under 28 U.S.C. § 1333(1) by invoking Federal Rule of Civil Procedure 9(h) and labelling the matter an admiralty claim.[1]

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1 Perhaps Elizabeth and her mother wanted the case in federal court because, under North Carolina law, contributory negligence provides a complete defense to a suit claiming negligence. *See Champs Convenience Stores, Inc. v. United Chemical Co.*, 406 S.E.2d 856, 861 (N.C. 1991). The shallowness of the water at the spot where Elizabeth dove presented a real likelihood of a finding of contributory negligence on her part. In admiralty,

Elizabeth had reached the Lewis home by way of a wave runner[2] which she secured to the dock. While she sunbathed, thirteen-year-old Lucy drove the wave runner in the Waterway. In response to Lucy's call to join her, Elizabeth made her unfortunate dive. The complaint alleged that Lucy and her parents were negligent: Lucy for inviting Elizabeth to dive into the water and climb aboard the wave runner, and the Lewises for failing to warn Elizabeth about the shallow water and to supervise or control their daughter.

Federal "admiralty and maritime jurisdiction" under article III, Section 2 of the United States Constitution exists when conditions both of (1) location and (2) connection with maritime activity are met. *Jerome B. Grubart, Inc. v. Great Lakes Dredge and Dock Co.*, __U.S. _, 115 S. Ct. 1043, 1048 (1995). A plaintiff must show a potentially disruptive impact on maritime commerce as well as a substantial relationship to traditional maritime activity in order to satisfy the second criterion. Id. In the present matter, the district court properly summarized the applicable analysis:

> [T]he inquiry whether a tort has occurred within the admiralty jurisdiction required the application of two tests__ the "locality" test and the "maritime nexus" or "connection" test, which itself calls for a two-pronged inquiry_(i) what is [the]general character of activity giving rise to [the]

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however, comparative negligence rather than contributory negligence applies. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406,408-09 (1953).

[2] The district court explained that "wave runner" is "a brand name for a personal watercraft, also commonly called a 'jet ski.'"

> incident and (ii) does it have a substantial relationship to traditional maritime activity.

The court then found that the requisite maritime connection was missing and granted the Lewises' motion to dismiss for lack of subject matter jurisdiction. Assuming the truth of the material facts alleged in the complaint as we must, we review the district court's dismissal *de novo*. *White v. United States*, 53 F.3d 43,44-45 (4th Cir. 1995).

Because the locality test was clearly met by Elizabeth's injury in navigable waters, *see Grubart*, 115 S. Ct. at 1048 (stating that the tort must occur on navigable waters, or if suffered on land, be caused by a vessel on navigable water); *White*, 53 F.3d at 46-47 (applying the test), we turn our attention to the question of maritime nexus. Even assuming that the incident was one that had the potential to disrupt maritime commerce if it occurred during a time of high commercial traffic or in a heavily-traveled thoroughfare, *see Grubart*, 115 S. Ct. at 1051 (describing the relevant inquiry as whether the general features of the mishap place it within a class of incidents that pose more than a fanciful risk to commercial shipping); *see also Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 675 (1982) (finding that even a collision between two pleasure boats on a small Louisiana river that saw little or no commercial traffic could potentially disrupt commercial activity), we cannot conclude that the event bears a substantial relationship to traditional maritime activity.

Elizabeth's dive into the water in order to swim, of itself, was not enough to create such a significant relationship. *Grubart*, 115 S. Ct. at 1051 (stating that the relationship between swimming and traditional maritime activity is "too attenuated" to compel admiralty rules). In ruling that admiralty jurisdiction did not extend to a claim

brought by a pleasure boat guest who injured himself when he dove from the boat into navigable waters and struck the bottom, we concluded:

> Reduced to its essence, this case is about swimming and diving, and an unfortunate accident that resulted in the course of a recreational outing. . . . It is not about piloting, shipping, or navigational error, or other aspects of traditional maritime activity. There is simply no predicative relationship upon which an otherwise typical tort claim may properly be described as relating to "matters with which admiralty is basically concerned."

Foster v. Peddicord, 826 F.2d 1370, 1376 (4th Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988). The same is true when the wave runner is regarded as a vessel and Lucy as its captain. Elizabeth was engaged in recreational diving and swimming. She was not injured in a collision with the wave runner, *see Oliver by Oliver v. Hardesty*, 745 F.2d 317, 320 (4th Cir. 1984) (finding admiralty jurisdiction exists over a claim arising from a collision between a swimmer and a pleasure boat because the claim rested on an allegation of negligent navigation of the boat), or an attempt to climb aboard it, *see White*, 53 F.3d at 48 (holding that admiralty jurisdiction extends to a claim of injury while disembarking a vessel docked in navigable waters). It stretches reality to believe that Elizabeth's plan to board the wave runner -- assuming that was the purpose of her dive -- was sufficient to create a substantial relationship to traditional maritime activity. *See Grubart*, 115 S. Ct. at 1051 (explaining that the pertinent inquiry is whether the general character of the activity giving rise to the incident is so closely related to traditional maritime activity that it required the application of admiralty rules).

The district court's dismissal for lack of subject matter jurisdiction is, accordingly,

AFFIRMED.

In The
United States Court of Appeals
For The Fourth Circuit

RECORD NO. 95-2302

LEE JETER BROCK, Guardian Ad Litem for ELIZABETH H. HARDY, a minor, and LEE JETER BROCK, Individually,

Appellants,

v.

FORREST RAY LEWIS, JAN LEWIS and LUCY LEWIS,

Appellees.

PETITION FOR REHEARING

FROM DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the United States Court of Appeals for the Fourth Circuit overlooked a material fact in determining whether admiralty jurisdiction exists?

II. Whether the United States Court of Appeals for the Fourth Circuit overlooked a material legal matter concerning the act of boarding as a traditional maritime activity?

INTRODUCTION

This petition for rehearing in the above entitled case is taken pursuant to Federal Rule of Appellate Procedure 40. The purpose of a petition for rehearing is to direct the Court's attention to one of the following situations: (1) A material fact or legal matter that has been overlooked in the decision, (2) A change in the law that has occurred after the case was submitted and has been overlooked by the panel, or (3) The opinion is in conflict with another decision of the Court or of another Court of Appeals and the conflict is not addressed in the opinion. In the judgment of the counsel for the appellants, the Court overlooked a material fact and a material legal matter in this decision.

STATEMENT OF THE CASE

This case is a claim for relief brought by the plaintiffs against the defendants on March 27, 1995. The plaintiffs alleged the defendants were negligent and responsible for the plaintiff's injuries. Plaintiffs asserted the district court's jurisdiction was based on federal admiralty jurisdiction under Rule 9(h) of the Federal Rules of Civil Procedure. (App. 7). The defendant's did not answer the complaint and moved to dismiss the complaint for lack of subject matter jurisdiction on or about May 4, 1995. The plaintiffs filed a Substitute/Amended Complaint on June 5, 1995. On June 8, 1995, the defendants moved to dismiss the complaint for lack of subject matter jurisdiction. The district court ordered the complaint dismissed and issued its judgment on June 19, 1995. The plaintiffs appealed the judgment on June 23, 1995. The case was argued before the Fourth Circuit Court of Appeals on March 7, 1996, and on May 24, 1996 the Fourth Circuit affirmed the district court's decision in an unpublished per curiam opinion.

STATEMENT OF FACTS

The plaintiff, Elizabeth H. Hardy, was an invited guest at the floating dock of the defendants on August 19, 1994. (App. 7,17) The defendants' home is located on the Intracoastal Waterway. (App. 6,16) The defendants are the owners of the house, "it's surrounding land and a pier with an attached floating dock which led into and serviced the Intracoastal Waterway." (App. 6, 16). The plaintiff, Elizabeth H. Hardy, came to the defendants' floating dock by operating a Wave Runner on the Intracoastal Waterway to the floating dock. (App. 7,18). Said Wave Runner is duly registered under the boat registration laws of North Carolina pursuant to North Carolina General Statute 75A-5. The boat registration number is NC-8475 CG. Elizabeth Hardy then docked the Wave Runner and secured the same to the floating dock. The defendant, Lucy Lewis, soon after boarded the Wave Runner and navigated it into the Intracoastal Waterway. After a short while, the defendant, Lucy Lewis, was navigating the Wave Runner and was approximately ten to fifteen feet from the floating dock. At this time Lucy Lewis commanded Elizabeth Hardy to dive into the Intracoastal Waterway and board the Wave Runner. (App. 7-8,18). Elizabeth Hardy, pursuant to the command of the defendant, then dove into the Intracoastal Waterway from the floating dock. (App. 8,18). After said dive, Elizabeth was injured when she struck her head on the bottom of the waterway. (App. 8,18). At the time, the depth of the waterway surrounding the floating dock was only twelve inches deep. (App. 7,17). Elizabeth was rendered quadriplegic as a result of the injury she sustained from the dive. (App. 8,18).

SUMMARY OF ARGUMENT

The Court of Appeals overlooked a material fact in this case as well as a material legal matter. The material

fact which the court has overlooked is the fact that Elizabeth Hardy dove into the Intracoastal Waterway in order to board the Wave Runner. The Court correctly recognized that the Intracoastal Waterway is a navigable waterway, and that the Wave Runner is properly considered a vessel. The error occurred when the Court characterized Elizabeth's dive as "recreational diving and swimming" (Opinion, page 4), when in fact it was an act of boarding.

In addition, because the Court of Appeals decided that the plaintiff's dive was recreational in nature, as opposed to an act of boarding, the Court incorrectly applied the law as it relates to dismissals of actions for want of subject matter jurisdiction.

ARGUMENT

I. THE COURT OF APPEALS OVERLOOKED THE MATERIAL FACT THAT ELIZABETH HARDY DOVE INTO THE INTRACOASTAL WATERWAY IN ORDER TO BOARD A VESSEL BEING OPERATED IN A NAVIGABLE WATERWAY.

In the case at bar, the Court of Appeals based its decision on the erroneous conclusion that "Elizabeth was engaged in recreational diving and swimming." (R4). This conclusion totally overlooks the fact that Elizabeth dove into the water in order to board the Wave Runner. The facts of the case, set out in Appellant's Brief, pp. 4-5, make it clear that Elizabeth dove into the water in response to the command of the defendant, Lucy Lewis, to get on the Wave Runner. Lucy Lewis was piloting the vessel in the Intracoastal Waterway, and commanded Elizabeth to board. In response to that command, Elizabeth dove off the floating dock surrounding the home of the defendants.

Elizabeth clearly dove off that pier for one purpose only - to board the vessel as she was commanded to do by

Lucy Lewis. Before that fateful dive, she had not been engaged in recreational swimming and diving. Instead, she had been sunbathing while Lucy Lewis piloted the Wave Runner in the Intracoastal Waterway. Elizabeth did not dive into the waterway in response to a command from the defendant to dive in and do some recreational swimming. Rather, the command was to board the Wave Runner. The only way to do so was to get off the pier and swim to the vessel, which was out in the waterway. Finally, Elizabeth did not spontaneously decide to do some recreational swimming and diving. The facts of the case indicate that had it not been for the command of the defendant, Elizabeth would not have attempted to enter the water for recreational purposes. However, when she heard the defendant's command to board the vessel, she attempted to comply in the only way possible - by entering the water and swimming out to the vessel. Although Elizabeth never completed that swim due to her injury, it is clear that the purpose of the swim was not recreational, but was instead an attempt to board the vessel being piloted by the defendant, Lucy Lewis. The Court of Appeals overlooked this material fact, and therefore the appellant's petition for rehearing should be granted.

II. THE COURT OVERLOOKED THE LAW REGARDING DISMISSALS OF CLAIMS FOR WANT OF SUBJECT MATTER JURISDICTION.

In the Court's unpublished per curiam opinion, the Court stated that Elizabeth Hardy was engaged in recreational swimming and diving. In reaching this conclusion, not only did the Court overlook a material fact, as stated above, but the Court also put itself in the improper position of finder of fact. The Court reached the factual conclusion that Elizabeth's fateful dive was not an act of boarding, as alleged by the plaintiffs, but rather an act of recreation with no relation to a traditional

maritime activity.

In reaching this conclusion, the Court overlooked the law relating to dismissals of claims for want of subject matter jurisdiction. The Supreme Court has held that a motion to dismiss an action for want of subject matter jurisdiction may be granted only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 2 L.Ed.2d 80 (1957). The Fourth Circuit has followed this ruling in Sigler v. LeVan, 485 F.Supp. 185 (D. Maryland 1980), provided that the parties provide sufficient support for their claim. Id., at 192.

In the case at bar, the plaintiffs have offered sufficient facts to support their contention that Elizabeth dove into the water in response to Lucy Lewis' command to board the Wave Runner. (App. 8,18) Although the defendants no doubt will dispute these facts, that dispute is for the trier of fact to decide. The relevant issue for the court, rather, is whether it is *beyond doubt* that the plaintiff can prove no set of facts which would entitle her to relief. In this case, based solely on the pleadings, it is certainly not beyond doubt that the plaintiffs might be able to prove that Elizabeth made her unfortunate dive in an attempt to board the vessel being piloted by the defendant. If doubt exists as to the purpose of Elizabeth's dive, then by definition the issue cannot be "beyond doubt". That doubt should be resolved by the trier of fact, not the Court based merely on the pleadings. For the Court to hold that it "stretches reality" (R4) to believe that Elizabeth's plan to board the Wave Runner was in no way connected to a traditional maritime activity is an oversight on the part of the Court with regard to the law.

The Court further overlooked the law regarding the applicability of admiralty jurisdiction in boarding cases. By focusing on the "general character of the activity", Sisson v. Ruby, 497 U.S. 358, 111 L.Ed.2d 292 (1990), at 301, several other courts have found that boarding is a traditional maritime activity. See, for example, Price v.

Price, 929 F.2d 131 (4th Cir. 1991) (disembarking a vessel was related to an activity that was traditionally maritime); Butler v. American Trawler Co., Inc., 707 F.Supp. 29 (D. Me. 1989) ("When negligence causes injury during the boarding of a vessel...the resulting cause of action sounds in admiralty..."); and Tullis v. Fidelity and Casualty Co. of New York, 397 F.2d 22 (5th Cir. 1968) (failure to provide safe means for disembarking is tort which sounds in admiralty). Therefore, boarding constitutes a traditional maritime activity. Because boarding is a traditional maritime activity which in its generality could effect navigational trade and commerce on navigable waters, the second prong of the Executive Jet test is met and federal admiralty jurisdiction applies. The Court overlooked the law regarding boarding cases in regards to admiralty jurisdiction. Therefore, because of this oversight, and because it is not "beyond doubt" that Elizabeth was trying to board the vessel when she made her dive, the petition for rehearing should be granted.

CONCLUSION

The Fourth Circuit Court of Appeals overlooked a material fact and the material law when it affirmed the decision of the district court. The material fact which was overlooked is that the plaintiff Elizabeth Hardy dove into the Intracoastal Waterway in order to board a vessel being piloted on navigable waters by the defendant, Lucy Lewis. The material law which was overlooked is that, in order for a complaint to be dismissed for want of subject matter jurisdiction, it must appear beyond doubt that the plaintiff can prove no set of facts which would entitle her to relief.

The plaintiffs have alleged sufficient facts to support their contention that Elizabeth Hardy was attempting to board the vessel piloted by the defendant, not engaging in "recreational swimming and diving" as the Court concluded. The very fact that there is some doubt

about her purpose means that the issue is not beyond doubt, and therefore dismissal for want of subject matter jurisdiction is not proper.

The Court of Appeals should grant the plaintiff's petition for rehearing on this matter.

This the 4th day of June, 1996.

ANDERSON, DANIEL & COXE

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FILING AND MAILING CERTIFICATES

I hereby certify that on this the 4th day of June, 1996, I filed with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit the required number of copies of this Petition for Rehearing and further certify that I mailed, via first class postage, the required number of copies of said Petition to the following:

William Robert Cherry, Jr., Esquire
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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
June 18, 1996

No. 95-2302
CA-95-44-7-F

LEE JETER BROCK, Guardian Ad Litem for Elizabeth H. Hardy, a Minor; LEE JETER BROCK, Individually

Plaintiffs - Appellants

v.

FORREST RAY LEWIS; JAN LEWIS; LUCY LEWIS

Defendants - Appellees

ORDER

The appellant has filed a petition for rehearing. The Court denies the petition for rehearing.

For the Court,

s/ Bert M. Montague
CLERK

CONSTITUTION

ARTICLE III

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior Courts, shall hold their offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; --to all Cases affecting Ambassadors, other public Ministers and Consuls; --to all Cases of admiralty and maritime Jurisdiction; --to Controversies to which the United States shall be a Party; --to Controversies between two or more States; --between citizens of different States; --between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States or Subjects. [1]

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

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[1] This section has been affected by the Eleventh Amendment.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

RULES OF CIVIL PROCEDURE

Rule 9. Pleading Special Matters

(a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, the party desiring to raise the issue shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) Official Document or Act. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the

judgment or decision without setting forth matter showing jurisdiction to render it.

(f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special Damage. When items of special damage are claimed, they shall be specifically stated.

(h) Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. The reference in Title 28, U.S.D. § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h).

(As amended Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 30, 1970, eff. July 1, 1970; Mar. 2, 1987, eff. Aug. 1, 1987.)

N.C.G.S. Sec. 75A-5

WEST'S NORTH CAROLINA STATUTES
CHAPTER 75A. BOATING AND WATER SAFETY
ARTICLE 1. BOATING SAFETY ACT

Current through End of 1995 Legislation

Sec. 75A-5. Application for numbers; fee; displaying; reciprocity; change of ownership; loss of certificate; presumption from possession of certificate; conformity with United States regulations; award of certificates; records; renewal of certificates; transfer of interest, abandonment, etc.; change of address; unauthorized numbers.

(a) The owner of each vessel requiring numbering by this State shall file an application for number with the Wildlife Resources Commission on forms approved by it. The application shall be signed by the owner of the vessel, or his agent, and shall be accompanied by a fee of eight dollars ($8.00) for a one-year period or by a fee of twenty dollars ($20.00) for a three-year period; provided, however, there shall be no fee charged for vessels owned and operated by nonprofit rescue squads if they are operated exclusively for rescue purposes, including rescue training. The applicant shall have the option of selecting a one-year numbering period or a three-year numbering period. Upon receipt of the application in approved form, the Commission shall have the same entered upon the records of its office and issue to the applicant a certificate of number stating the number awarded to the vessel and the name and address of the owner, and a validation decal indicating the expiration date of the certificate of number. The owner shall paint on or attach to each side of the bow of the vessel the identification number in such manner as may be prescribed by rules of the Commission in order

that it may be clearly visible. The number shall be maintained in legible condition. The validation decal shall be displayed on the starboard bow of the vessel immediately following the number. The certificate of number shall be pocket size and shall be available at all times for inspection on the vessel for which issued, whenever such vessel is in operation. Provided, however, any person charged with failing to so carry such certificate of number shall not be convicted if he produces in court a certificate of number theretofore issued to him and valid at the time of his arrest.

(b) The owner of any vessel already covered by a number in full force and effect which has been awarded to it pursuant to then operative federal law or a federally approved numbering system of another state shall record the number prior to operating the vessel on the waters of this State in excess of the 90-day reciprocity period provided for in G.S. 75A-7(a)(1). Such recordation shall be in the manner and pursuant to the procedure required for the award of a number under subsection (a) of this section, except that no additional or substitute number shall be issued.

(c) Should the ownership of a vessel change, a new application form with a fee of eight dollars ($8.00) for a one-year period or by a fee of twenty dollars ($20.00) for a three-year period shall be filed with the Wildlife Resources Commission and a new certificate bearing the same number shall be awarded the new owner in the manner as provided for in an original award of number. In case a certificate should become lost, a new certificate bearing the same number shall be issued upon payment of a fee of two dollars ($2.00). Possession of the certificate shall in cases involving prosecution for violation of any provision of this Chapter be prima facie evidence that the person whose name appears therein is the owner of the boat referred to therein.

(d) In the event that an agency of the United States government shall have in force an over-all system of

identification numbering for vessels within the United States, the numbering system employed pursuant to this Chapter by the Wildlife Resources Commission shall be in conformity therewith.

(e) **(Effective October 1, 1994 -- See editor's note)** The Wildlife Resources Commission may award any certificate of number directly or may authorize any person to act as agent for the awarding thereof. In the event that a person accepts such authorization, he may be assigned a block of numbers and certificates therefor which upon award, in conformity with this Chapter and with any rules and regulations of the Commission, shall be valid as if awarded directly by the Commission. As compensation for his services any such agent shall be allowed to retain for his own use fifty cents (50¢). It is a Class 1 misdemeanor for any such agent to charge or accept any additional fee, remuneration, or other thing of value for such services.

(f) All records of the Wildlife Resources Commission made or kept pursuant to this section shall be public records.

(g) Each certificate of number awarded pursuant to this Chapter, unless sooner terminated or discontinued in accordance with the provisions of this Chapter, shall continue in full force and effect to and including the last day of the same month during which the same was awarded after the lapse of one year in the case of a one-year certificate or three years in the case of a three-year certificate. In addition to the year of expiration, the validation decal required by subsection (a) of this section shall indicate the last month during which the certificate if valid. No person shall willfully remove a validation decal from any vessel during the continuance of its validity or alter, counterfeit, or otherwise tamper with a validation decal attached to any vessel for the purpose of changing or obscuring the indicated date of expiration of the certificate of number of such vessel.

(h) Each certificate of number awarded pursuant to this Chapter must be renewed on or before the first day of the

month next succeeding that during which the same expires; otherwise, such certificate shall lapse and be void until such time as it may thereafter be renewed. Application for renewal shall be submitted on a form approved by the Wildlife Resources Commission and shall be accompanied by a fee of eight dollars ($8.00) for a one-year period or by a fee of twenty dollars ($20.00) for a three-year period; provided, there shall be no fee required for renewal of certificates of number which have been previously issued to commercial fishing boats as defined in G.S. 75A-5.1, upon compliance with all of the requirements of that section.

(i) The owner shall furnish the Wildlife Resources Commission notice of the transfer of all or any part of his interest other than the creation of a security interest in a vessel numbered in this State pursuant to subsections (a) and (b) of this section or of the destruction or abandonment of such vessel, within 15 days thereof. Such transfer, destruction, or abandonment shall terminate the certificate of number for such vessel except that, in the case of a transfer of a part interest which does not affect the owner's right to operate such vessel, such transfer shall not terminate the certificate of number.

(j) Any holder of a certificate of number shall notify the Wildlife Resources Commission within 15 days if his address no longer conforms to the address appearing on the certificate, and shall, as a part of such notification, furnish the Commission his new address. The Commission may provide in its rules and regulations for the surrender of the certificate bearing the former address and its replacement with a certificate bearing the new address or for the alteration of an outstanding certificate to show the new address of the holder.

(k) No number other than the number awarded to a vessel or granted reciprocity pursuant to this Chapter shall be painted, attached, or otherwise displayed on either side of the bow of such vessel, except the validation decal required by subsection (a) of this section.

(l) When certificates of number are to be issued by agents as provided by subsection (e)of this section, the Wildlife Resources Commission is authorized by regulation to establish the qualifications of such agents, including, but not limited to, their financial responsibility, the locations and types of business operated by them and their facilities for safekeeping of unused certificates of number, validation decals, and the monetary proceeds of certificates which have been issued; to prescribe the duties of such agents, including, but not limited to, the methods of issuing certificates of number and validation decals, the evidence of ownership of vessels to be numbered by applicants for number, the times and methods of making periodic and final reports of certificates and decals issued and remaining unissued and remittances of public moneys and unissued certificates and decals; to establish methods and procedures of ensuring accountability of such agents for the proceeds of certificates and decals issued and for certificates and decals remaining unissued; to require individual or blanket bonds of such agents in amounts sufficient to protect the State against loss of public moneys and unissued certificates and decals, the premiums for such bonds to be paid by the agents; to permit such agents to issue both original certificates of number and validation decals and renewals thereof or to limit such agents, or any of them, to the issuance of the originals only; to authorize some or all of such agents to issue temporary certificates of number for use during a limited time pending delivery of regular certificates of number and validation decals; to establish methods and procedures, including submission of the amounts and kinds of evidence which the Commission may deem sufficient, whereby any such agent may be relieved of accountability for the value of unissued certificates and validation decals, or of the monetary proceeds of those which have been issued, which have been lost or destroyed as the result of any occurrence which is beyond the control of such agent; and to prescribe such other reasonable requirements and

conditions as the Commission may, in its discretion, deem necessary or desirable to expedite and control the issuance of certificates of number by such agents. In accordance with such regulations, the executive director is authorized to prepare and distribute all forms necessary or convenient for application for and the appointment and bonding of such agents and for receipts, reports and remittances by such agents; to select and appoint such agents in areas most convenient to the boating public and to limit the number of such agents in any locality; to require prompt and accurate reporting and remission of public moneys and unissued certificates and decals by such agents, and to require periodic or special audits of their accounts; to revoke or terminate any such agency for failure to make timely reports and remittances or to comply with any administrative directive or regulation of the Commission, or when he has reason to believe that State money or property is in jeopardy; and to require immediate surrender of all agency accounts, forms, certificates, decals and State moneys in the event of such revocation or termination of any such agency. A person who is denied the authority to act as an agent for the issuance of certificates of number and validation decals or whose authority to do so is revoked may not commence a contested case under G.S. 150B-23. Any violation of the regulations authorized by this subsection shall be a Class 1 misdemeanor. If any check or draft of any agent for the issuance of certificates of boat number shall be returned by the banking facility upon which the same is drawn for lack of funds, such agent shall be liable to the Wildlife Resources Commission for a penalty of five percent (5%) of the amount of such check or draft, but in no event shall such penalty be less than five dollars ($5.00) or more than two hundred dollars ($200.00).

Amended by Laws 1993, c. 422, Secs. 2 to 4, eff. Jan. 1, 1994; Laws 1993, c. 539, Secs. 563, 564, eff. Oct. 1, 1994, Ex.Sess., c. 24, Sec. 14(c), eff. March 26, 1994.

Supreme Court, U.S.
FILED
OCT 15 1996
CLERK

No. 96-419

In The

Supreme Court of the United States

October Term, 1996

LEE JETER BROCK, Guardian Ad Litem for ELIZABETH H. HARDY, a minor, and LEE JETER BROCK, Individually,

Petitioners,

v.

FORREST RAY LEWIS, JAN LEWIS and LUCY LEWIS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Respondents submit that the questions presented for review can be simplified as follows:

1. Did the lower courts impermissibly find facts when considering the Respondents' Motion to Dismiss for lack of subject matter jurisdiction?

2. Did the lower courts properly apply the tests for admiralty jurisdiction as enunciated by this Court in *Jerome B. Grubart v. Great Lakes Dredge and Dock Co*?

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents hereby oppose the Petition For A Writ Of Certiorari.

I. MISSTATEMENTS OF LAW AND FACT

Central to the Petitioners' request to this Court that the decision below be reviewed is their assertion that a Rule 12(b)(1) "motion to dismiss an action for want of subject matter jurisdiction may be granted *only* if it appears beyond a doubt that the plaintiff can prove no set of facts in support of her claim which would entitle her to relief." (Petition at page 5) (emphasis added). In support of this statement of the law, the Petitioners grossly miscite the case of *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed. 2d 80 (1957). (Petition at page 5). Obviously, the Petitioners are setting forth the standard with regard to a Motion to Dismiss for failure to state a claim filed pursuant to Rule 12(b)(6), not the standard concerning a Motion to Dismiss for lack of subject matter jurisdiction filed pursuant to Rule 12(b)(1). *See* 355 U.S. at 45, 78 S.Ct. at ___, 2 L.Ed. 2d at 84 ("in appraising the sufficiency of the Complaint we follow, of course, the accepted Rule that a Complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.").

Moreover, it must be kept in mind that federal courts are courts of limited jurisdiction and the Petitioners had the burden of proving jurisdiction was proper in this case. *See Growth Horizons, Inc. v. Delaware County, Pa.*, 784 F.Supp. 258, 260 (E.D. Pa. 1992), *rev'd on other grounds*, 983

F.2d 1277 (3rd Cir. 1993) (citations omitted). In considering the Rule 12(b)(1) Motion contesting subject matter jurisdiction, it was incumbent upon the district court below to find facts and, indeed, resolve factual disputes – not to assume jurisdictional allegations as true as the Petitioners urge. *Compare Hair v. Tennessee Consol Retirement System*, 790 F.Supp. 1358, 1362 (M.D. Tenn. 1992) (citing *Rogers v. Stratton Industries, Inc.*, 798 F.2d 913, 918 (6th Cir. 1986) ("The Court has a duty to resolve any factual disputes on a Rule 12(b)(1) motion.") *with* Petitioners' Brief at page 3 ("Accepting this set of facts [as alleged in the Complaint] as true, there is sufficient evidence to support a claim sounding in admiralty.").

When analyzing a motion such as the one presented in this case, it is settled that "the court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction to hear the action." 2A MOORES FEDERAL PRACTICE ¶ 12.07[2.-1] (citing *Land v. Dollar*, 330 U.S. 731, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947)); *See also Growth Horizons, Inc. v. Delaware County, Pa.*, 784 F.Supp. at 260 (quoting *Mortensen v. First Federal Savings and Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977) ("the court is free to weigh the evidence and satisfy itself as to the existence or not of its power to hear the case.") and (citing *Haase v. Sessions*, 835 F.2d 902, 908 (D.C. Cir. 1987)). Moreover, below, the court of appeals was required to "accept the District Court's factual findings on jurisdictional issues unless clearly erroneous." *Delta Country Ventures, Inc. v. Magana*, 986 F.2d 1260, 1262 (9th Cir. 1993) (citation omitted).

Recognizing that the district court was faced with the situation of determining the issue of subject matter jurisdiction, the Petitioners responded to the Motion to Dismiss by supplying the district court with the affidavit of the minor plaintiff, Elizabeth H. Hardy. (*See* Attachment to Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss, filed with the district court May 24, 1995 (hereinafter "Hardy Affidavit")). In that regard, the Petitioners now misstate the facts by not fully and completely referring this Court to all matters presented to and upon which the lower courts properly relied in determining that there was no admiralty jurisdiction in this particular matter.

In considering the activity which was taking place upon the Respondents' private floating pier, it should be understood that the Petitioner, Elizabeth Hardy, (hereinafter "Elizabeth") was fourteen (14) years old and the Respondent, Lucy Lewis, (hereinafter "Lucy") was thirteen (13) years old at the time. (*Id.* at 1.) Further, Elizabeth has averred that the activity which gave rise to her injuries occurred as follows:

> At the time the injuries were sustained, I dove from the Defendants' floating dock into the navigable channel of the IntraCoastal Waterway at the command, direction and urging of captain LUCY LEWIS who was then the captain and operator of the vessel that was underway in the navigable channel of the IntraCoastal Waterway and onto which I was in the process of boarding.
>
> At the time I dove from the floating dock into the IntraCoastal Waterway, the Wave Runner was approximately ten to fifteen feet from the floating dock at a forty-five degree angle from

> the floating dock to my right and into the inland [sic] waterway. The Wave Runner was not adjacent to the floating dock. I dove directly into the IntraCoastal Waterway between the two pilings on the floating dock that were closest to the channel of the IntraCoastal Waterway. The dive was perpendicular to the actual channel of the IntraCoastal Waterway.

(Hardy Affidavit at page 3). Also relevant to this activity and regarding Lucy's knowledge, experience and prior operation of Elizabeth's wave runner, Elizabeth further stated:

> LUCY LEWIS, on occasions prior to the date of the accident, had captained the Wave Runner, conditioned upon me being a passenger and only if both were vested. That prior to the time that LUCY LEWIS donned the Wave Runner vest and boarded the vessel, starting same and becoming captain of same and operating same into the IntraCoastal Waterway, the boat had been properly secured and docked to the floating dock by me and turned off.

(*Id*). Finally, with regard to Elizabeth's prior experience with getting on the Wave Runner at the Respondent's floating dock, she stated:

> LUCY LEWIS's floating dock was my first experience of diving from a floating dock and utilizing said floating dock for the docking of a vessel. I had docked the vessel on a number of occasions during the prior six (6) weeks in the same or similar manner. However, *on all prior occasions*, both LUCY LEWIS, as the captain of the vessel and me as passenger, had utilized the boarding process of stepping from the floating

> dock directly onto the vessel without entering the navigable waters of the IntraCoastal Waterway.

(*Id.* at 3-4) (emphasis added).[1]

II. REASONS WHY PETITION SHOULD BE DENIED

With the law governing the consideration of the Rule 12(b)(1) motion correctly stated and the facts fully disclosed, it is apparent that neither of the Petitioners' arguments for the issuance of a Writ of Certiorari has any merit.

A. THE COURTS BELOW PROPERLY APPLIED THE FACTS TO THE LAW.

The District Court and Fourth Circuit Court of Appeals below found that under the facts presented for consideration by the Petitioners, Elizabeth was not engaged in an act of boarding a vessel when she was injured. (Appendix at 46 and 55). Rather, as the Court of Appeals concluded, Elizabeth was engaged in recreational diving and swimming. (Appendix at page 55). The Petitioners' only argument to the contrary is that the

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[1] While it is not relevant to the questions presented by the Petitioners, they further misstate the facts of this case by stating in the Statement of Facts that the Wave Runner was duly registered under North Carolina Law. There is no reference made by the Petitioners to the record where such registration can be found and such evidence is not in the record. (*See* Petition at page 2).

courts reviewing this matter must accept their characterization of the activity as "boarding" and, for jurisdictional purposes, that is the end of the inquiry. (Petition at pages 3-4). However, as set forth above, the courts below were required to determine jurisdictionally relevant facts. Each court correctly determined that the activity giving rise to Elizabeth's injury was not such that there existed a substantial relationship to traditional maritime activity. Each court properly concluded that admiralty jurisdiction did not exist in this matter. (Appendix at page 55). We are not in Wonderland and the Petitioners are not Humpty Dumpty paying the word "boarding" to mean what they say it means. The decision by the Court of Appeals for the Fourth Circuit is proper and the Petition for a Writ of Certiorari should be denied.

B. NO CONFLICT WITH *JEROME B. GRUBART v. GREAT LAKES DREDGE AND DOCK CO.*

This Court in *Jerome B. Grubart, Inc. v. Great Lakes Dredge and Dock Co.*, ___ U.S. ___, 115 S.Ct. 1043, 130 L.Ed. 2d 1024 (1995), reaffirmed two tests for determining admiralty jurisdiction, the location test and the connection or nexus test. *Id.* U.S. at ___, 115 S.Ct. at 1048. With regard to the connection test, this Court in *Grubart* held that the reviewing court "first, must 'assess the general features of the type of incident involved' to determine whether the incident has 'a potentially disruptive impact on maritime commerce' ". *Id.* (citation omitted). There is a second aspect of the connection test which must be satisfied and the reviewing court, also, "must determine whether 'the general character' of the 'activity giving rise

to the incident' shows a 'substantial relationship to traditional maritime activity' ". *Id.* (citation omitted).

It is thus obvious that the lower courts are burdened with the task of finding facts and determining, first, the general features of the incident involved and, second, the general character of the activity giving rise to the incident in order to determine whether or not the incident in question satisfies the connection test for admiralty jurisdiction. The Petitioners argue that Elizabeth was injured while engaged in a traditional maritime activity, "boarding", and, thus, the connection test is satisfied and admiralty jurisdiction applies. (Petition at page 8). However, again, the Petitioners' argument is premised on their erroneous assumption that the court may only consider their characterization of the "facts" as stated in their Complaint and cannot engage in any fact finding when determining the existence of admiralty jurisdiction *vel non*. As discussed above and as this Court held in *Grubart*, the lower courts correctly considered the 12(b)(1) Motion to Dismiss in this case. As the Fourth Circuit Court of Appeals held, "[i]t stretches reality to believe that Elizabeth's plan to board the wave runner – assuming that was the purpose of her dive – was sufficient to create a substantial relationship to traditional maritime activity." (Appendix at page 55).

The Fourth Circuit Court of Appeals carefully and properly followed this Court's mandate and properly applied the tests as set forth in *Grubart*. There is no conflict between that application of fact to law and this Court justifying intervention. The Petition for Certiorari should be denied.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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